SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1901.

No. 211.

THE UNITED STATES, APPELLANT,

vs.

M. R. PENDELL AND J. ESCOBAR.

APPEAL FROM THE COURT OF PRIVATE LAND CLAIMS.

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1 UNITED STATES OF AMERICA,
Territory of New Mexico.

Be it remembered that heretofore, to wit, on the 2d day of March, A. D. 1893, M. R. Pendell et al., by their attorneys, Catron and Coons, filed in the office of the clerk of the Court of Private Land Claims, at Santa Fe, New Mexico, a petition; which petition is in words and figures following, to wit:

2 UNITED STATES OF AMERICA.

In the Court of Private Land Claims, sitting at Santa Fe, New Mexico.

M. R. PENDELL AND J. ESCOBAR, PLAINTIFFS,
vs.
THE UNITED STATES.

To the Honorable JOSEPH R. REED, *chief justice, and the associate justices of said court:*

M. R. Pendell, a resident of the city of Cleburne, in the State of Texas, and J. Escobar, a resident of the city of El Paso, in the same State, plaintiffs, bring this their petition against the United States of America, defendant, and thereupon represent and show to this honorable court as follows:

1st. That prior to the year 1790 a tract of land known as Santa Teresa, the precise location of which will be more particularly hereinafter described, was granted to Francisco Garcia by the Spanish authorities of what was then New Biscay, and now is the State of Chihuahua, of Mexico. Said grant was good and valid, and the said grantee entered upon and took possession of the same, and he and his heirs and assigns continued in peaceable possession up to and after the celebration of the treaty of December 30, 1853, between the Government of Mexico and the United States, by the terms of which treaty the territory in question, including the Santa Teresa grant, was transferred to the sovereignty of the United States.

In the year 1846, while the original documents of title were in the possession of one of the heirs of the said Francisco Garcia, the town of Paso del Norte, in the State of Chihuahua, where the said heir resided, was occupied by the military forces of the United States, and the said original documents of title and the official registry, where they were recorded, were destroyed by the said forces. In order to perpetuate the evidence of title to said grant, Jose Maria Garcia, one of the heirs of said original grantees, on January 7th, 1853, made application to the proper judicial authorities at El Paso del Norte, in accordance with the laws and customs of the Mexican Republic, and asked for a revalidation of the said title. On January 16, 1853, the said judicial authorities reestablished the boundaries and monuments of said grant and placed the heir in formal and legal possession of the same.

3 The certified record of the proceedings of the said judicial authority in the reestablishment of said boundaries and monuments and placing the said heir in possession of said tract of land, are now on file in the office of the United States surveyor-general for

the Territory of New Mexico, and are not in the possession or control of the petitioners so that they can file the same herewith. A duplicate copy of the same, which are in the Spanish language, with a translation, also in duplicate, is herewith filed, marked Exhibit A.

Said tract of land is situate in the county of Doña Ana and Territory of New Mexico.

The boundaries of the same, as they appear in the act of possession, made on January 16, 1853, are as follows: "Being at the bend of the Piedras Paradas, there was measured a cordel of fifty varas of the commercial vara, and was shown as the old boundary by the party interested and the practical Alejo Martinez a thick cottonwood on the margin of the river, from which has been cut purposely solid parts of the bark from around it, and from this point proceeding above from south to north, there was measured four hundred cordels (400) of fifty varas, bounded on the east side by the Rio Bravo, the measure reaching to a cottonwood standing on the bank of the river near some sandhills, with three or four palmetto plants which are found in the bend of the Cobreña, which cottonwood was marked as a boundary by taking from it the bark until penetrating to the center of the wood. From this point the measurement turned from east to west on the north side, and there was measured one hundred (100) cordels of fifty varas, which reached above the brow (cija) to a small forest of ojasin, at which point was placed as a landmark a pile of stone; turning the measure from north to south on the west side there was measured four hundred cordels, over the hills and near the brow (cija), and they reached to a depression of the hills and the brow (cija), where there was placed as a landmark a mound of earth; turning the measurement from west to east in direction to the river, there was measured (100) one hundred cordels of fifty varas, encountering the thick cottonwood which remained marked as the first landmark. A sketch map of said tract, showing its extent and boundaries as near as may be, is herewith filed, marked Exhibit B.

A preliminary survey of this claim was made under the direction of the General Land Office in 1883, and covers an area of 9,681.29 acres.

4 The petitioners protest that this survey is not in accordance with the boundary calls set forth in said act of possession.

2nd. The said Santa Teresa grant has been considered and acted upon by the surveyor-general of New Mexico and recommended by him as reported Number 111 for confirmation by the Congress of the United States. His opinion and the proper papers were transmitted through the proper channels for the action of Congress. No further actions have been taken in regard to said land grant by Congress nor by any other authority constituted by law for the adjustment of land titles in the Territory of New Mexico.

3rd. The lands claimed contain no known mines or minerals of gold, silver, or quicksilver.

4th. The petitioners are the owners in fee in and to the said land grant, by inheritance and purchase, from the original grantee, Francisco Garcia. The title of the original grantee, his heirs and assigns, in and to said grant of land, was complete and perfect at the date when the United States acquired sovereignty over said Territory of New Mexico and at the time of the celebration of the treaty between the United States and the Mexican Republic, known as the Gadsden purchase, on December 30,

1853, and the land has been in the peaceable and undisputed possession of the original grantee, his heirs, assigns, and legal representatives from the date of the making of the grant to the present time.

5th. There is no person in possession of said land claiming the same adversely to your petitioners or otherwise than by the lease or permission of your petitioners.

Plaintiffs therefore pray that this petition be considered by this honorable court and that the validity of said grant of land so made as aforesaid be enquired into and decided, and that said tract of land, with the boundaries as granted and as set out in the said act of possession, be confirmed unto the petitioner, the heirs and legal representatives of the original grantee forever. And for such other and general relief as the nature of the case requires and to this honorable court may seem meet and proper.

CATRON & COONS,
Attorneys for Plaintiffs.

5 PLAINTIFF'S EXHIBIT A.

Sr. Juez 2o. de lo civil del Canton:

José Maria Garcia, vecino de esta Villa, y alvacea testamentario con poder in solidum, segun la clausula 10a. del testamento otorgado por mi finada madre á los 29 dias del mes de Marzo de 1848, como se vé del testamto. q. presento y pido se me debuelva, tomada q. sea razon de dicha clausula, ante V. comparesco y digo. Que aun permaneca sin repartir entre los herederos de mi finada madre el rancho llamado Santa Teresa, rio arriba de esta Villa, y cuyas escrituras se me perdieron cor otros papeles y intereces quando las fuerzas Americanas ocuparon esta Villa en la Guerra pasada, oradando mi citada casa, y ocupandola constantemente, con tropa como fué notorio; y para suplir de alguna manere la falta de los primitibos documentos, y ecsistiendo en esta Villa personas respetables q. vieron dichos documentos q. eran los títulos de los cuatro sitios de ganado mayor q. desde antes del año de 1790, del siglo pasado poseia mi padre, y despues estubimos nosotros ocupando hasta q. los indios, nos hicieron salir de alli, y ecsistiendo todabia algunos bibientes de los q. trabajaban en nuestro serbicio en el rancho, y siendo notorio q. el tal rancho se ha reconosido de muchos años atras, como legítima propiedad de la casa de mis padres q. represento, he de merecer á V. q. mediente la q. ejerce y bajo de juramento, se sirba V. interrogar á los Señores Dn. Franco. Rascon, Dn. Guadalupe Miranda, Dn. José Maria Maese, Alejo Martinez, José Abalos, y Julian Alday, al tenor del siguiente interrogatorio.

1a. Digan su nombre, y demas Generales de la Ley.

2o. Digan los seis testigos citados, si es notorio y público, ha ocupado por cincuenta años, el rancho llamado Santa Teresa, con nuestros bienes de campo, y sirbientes.

3a. Digan los tres primeros, si les consta haber visto los documentos primordiales del rancho de mi finado padre Dn. Franco. Garcia, llamado Santa Teresa, y si recuerdan q. comprendian cuatro sitios de ganado mayor, y si es notorio q. en la imbacion Americana, se ocupó mi casa por las fuerzas de los Estados Unidos, y se me estrabiaron estos y otros documentos.

4a. Digan los tres ultimos si estubieron en el serbicio de nuestra familia, por mas de 20 años, y por tal motibo vibieron an nuestro rancho de Santa Teresa.

5a. Digan si conocieron las casas q. habia en dicho rancho, los corrales y los linderos q. se reconocian por dicha propiedad.

Y concluida q. sea esta informacion, y resultando de ella la 6 demarcacion de los linderos primordiales, pido al Señor Juez me dé la posecion q. por derecho me corresponde, á nombre de los herederos Garcias, mis hermanos, q. lo son hijos todos de Dn. Franco. Garcia, y Da. Josefa Horcasitas, José Ma.; Da. Guadalupe, Dn. Franco.; Da. Jesus, Dn. Rafael, Dn. Pedro, q. han llegado á la mayor edad; y murieron parbulos, José, Canuto, y Vicente, segun consta y lo declara, la 3a. clausula del citado testamento; en cuya posecion se ha de serbir V. mandarnos amparar y defender, sin q. nadie nos perturbe ni moleste, sin ser oido en juicio, y para nosotros y nuestros herederos.

Es justicia q. pido, protestando no ser de malicia, y suplicando se me admita el presente escrito en papel comun por no haber del sellado correspondiente.

Villa del Paso del Norte, Enero 7 de 1853.

JOSÉ MARIA GARCIA.

VILLA DEL PASO DEL NORTE,
Enero 9 de 1853.

Por presentado este escrito con el testamto. q. le acompaña fecha 29 de Marzo de 1848. (y yo el Juez doy fé tener á la vista un testamento legal de la fecha referida, en cuya clausula 10a. me consta estar instituido como primer albacea in solidum, el Señor Dn. José Maria Garcia, en el testamto. de su finada madre Da. Josefa Horcasitas de Garcia); é igualmente consta la institucion de los herederos de esta en la clausula 3a. en q. menciona como hijos legítimos de ella, y su esposo Dn. Franco. Garcia, á Dn. José Maria, Da. Guadalupe, Dn. Franco. Da. Jesus, Dn. Rafael, y Dn. Pedro; cuyo testamento se le debuelve al albacea; y por cuanto á la informacion q. promuebe el solicitante, citese á los testigos mencionados para el dia 11 del corriente mes; y con lo q. resulte se probeerá. Asi lo decretó, mandó, y firmó, el Juez 2o. y de 1a. Ynstancia de esta Villa, C. Bentura Lopez, con sus testigos de asista. Doy fé.

BENTURA LOPEZ.

A.
FRANCO. BARRON.

A.
FELIZ LERMA.

Notificado el Albacea Dn. José Ma. Garcia del decreto anterior, dijo; q. lo oye y queda entendido; y firmó con el Juez, y los de Asista. Doy fé.

LOPEZ.
JOSÉ MARIA GARCIA.

A.
JUA^n^ BARRON.

A.
FELIZ LERMA.

En 11 de Enero de 1853.

Presente Dn. Franco. Rascon, y bajo el Juramento q. prestó conforme á la ley, por el q. ofreció decir verdad en lo q. supiere y fuere preguntado, dijo llamarse como queda dicho, mayor de 60 años, natural del
7 partido de la Consepcion, y abecindado en esta Villa del año de 1813, y oficio labrador, sin generales, R. C. A. P.

Preguntado sobre el contenido de la 2a. pregunta, leida q. le fué: Dijo, q. del año de 1813, en adelanta el, conoció el rancho de Dn. Franco. Garcia, llamado Santa Teresa, por q. en el, estubo varias veces, hasta q. se despobló por la imbacion de los Yndios, por el cual pasa hoy el camino, q. va pa. las colonias de arriba, y yá cuando vino á esta villa, oyó decir á personas de verdad, q. el rancho de Santa Teresa, era una propriedad antigua de Dn. Franco Garcia, á quien vió en dicho rancho algunas veces con sus sirbientes é intereses de campo.

Preguntado sobre el contenido de la 3a. pregunta dijo: q. repetidas veces tubo en sus manos la posecion y documentos primordiales, del rancho de Santa Teresa, autorisado por uno de los tenientes Gobernadores q. mandaron en este partido en fines del siglo pasado, q. con motibo de haber sido empleado el padre del deponente en esta misma Villa, poco despues del año de 1821; vió en el Archibo de la oficina de su padre protocolisada la posecion de dicho rancho, y q. aunq. no requerda la fecha, pero puede afirmar q. dicha posecion era de tres é cinco leguas, cuyos documentos sabe q. se es trabiaron cuando los Americanos tomaron posecion de los Archibos de este Villa, y ocuparon la casa de Dn. José Maria Garcia. Que lo dicho es la verdad sobre las preguntas q. le han hecho, y en ellas se afirma y ratifica en fé del Juramento q. tiene prestado; firmandola con el Juez y los testigos de Asista. Doy fé.

Franco. Rascon.
Bentura Lopez.

A.
Franco. Barron.
A.
Feliz Lerma.

Y luego presente Dn. Guadalupe Miranda, á quien tomé su Juramento en forma conforma á derecho, y bajo el cual ofreció decir verdad en lo q. supiere y fuere preguntado, dijo: llamarse como queda dicho, de 40 años; natural de esta Villa, comerciante, sin generales, y de R. C. A. R.

A la 2a. pregunta dijo: q. ha sido notorio en esta Villa, q. por algunos años poseyeron y ocuparon con sus bienes de campo, el finado Dn. Franco. Garcia, y sus hijos, el rancho de Santa Teresa, situado, arribe de esta Villa.

A la 3a. pregunta dijo: q. ha sido informado por personas fidedignas q. vieron algunos documentos de tal posecion; y es un hecho notorio q. en la epoca de la ocupacion de las fuerzas Americanas en esta Villa, dichas fuerzas, destruyeron parte de los archibos públicos, ocuparon la casa de Dn. José Maria Garcia á quien le estrajeron algunos documentos de sus poseciones y papeles de importancia, entre los q. se asegure
8 ecsistian los documentos del citado rancho, el cual segun recuerda se asegura, q. comprendia un espacio de cuatro leguas. Que lo dicho es la verdad, sobre las preguntas q. se le han hecho. y leidas q. le

fueron se afir mó y ratificó en fé del Juramento q. tiene prostado; y firmó con el Juez, y los de Asista. Doy fé.

GUADALUPE MIRANDA.
BENTURA LOPEZ.

A.
FRANCO. BARRON.
A.
FELIZ LERMA.

Acto continuo. Dn. José Maria Maese, compareció; y conforme á la ley, presto Juramento de decir verdad en lo q. supiere y fuere greguntado; y siendo lo por su nombre y demas generales, de la ley, dijo: llamarse como queda dicho, q. es mayor de 40 años, natural de esta Villa oficio labrador, sin generales, y R. C. A. R.

Y dijo á la 2a. pregunta q. él estubo varias veces en el rancho de Santa Teresa, perteneciente á Dn. Franco. Garcia, q. está arriba de esta Villa, y oyó decir desde muy joben, á ancienos muy respetables, q. el referido Sr. Garcia tubo sus bienes de campo en el citado rancho, desde fines del siglo pasado.

A la 3a. pregunta, dijo: q. recuerda haber visto, los títulos de Santa Teresa, dados por un teniente Gobernador en esta Villa, en tiempo del Gobierno español, q. no recuerda las fechas de dichos documentos, pero si está cierto q. comprendian una donacion de cuatro leguas; q. es notorio q. las fuerzas Americanas y tambien las mejicanas, destruyeron parte de los Archibos publicos de esta Villa, en los años de 1847 y 1848, asi como tambien q. los Americanos ocuparon la casa de Dn. José Maria Garcia, á quien le tomaron algunos papeles de importancia, y sabe por personas fidedignas q. en dichos años perdieron los documentos, los Señores Garcia, q. tenian de Santa Teresa. Que lo dicho es la verdad, sobre las preguntas q. le han hecho, y en ellas se afirma y ratifica, en fé del Juramento q. tiene prestado; y fir mó con el Juez, y los de Asistencia. Doy fé.

JOSÉ MARIA MAESE.
BENTURA LOPEZ.

A.
FRANCO. BARRON.
A.
FELIZ LERMA.

Presente el C. Alejo Martinez, bajo la protesta de la Ley q. presto confirme á dereco, por la q. ofreció decir verdad en lo q. supiere y fuere preguntado; y siendolo por su nombre y demas generales, dijo: llamarse como queda dicho, estado viudo, edad 60 años oficio labrador, natural de esta Villa, C. A. R.

Preguntado sobre el contenido de la 4a. pregunta: dijo: q. él ha serbido mas de 20 años, á la familia de los Señores Garcia, en diferentes ocupaciones, por cuyo motibo paciones, por cuio motivo estubo
9 algunos años, antes del de 1820, en el rancho de Santa Teresa, donde los Señores Garcia, tenian su caballada, ganado mayor y menor.

A la 5a. pregunta dijo: q. él conoció las diferentes piezas de adobe de la casa pral. del rancho de Santa Teresa, los corrales, y algunos jacales, de

palos, de los sirbientes, y q. era muy sabido y notorio, q. uno de los linderos está en el ancon de abajo de piedras paradas, por el lado de abajo serbia de linea, el rio, por el lado del Norte atrabesaba el lindero en el rincon de la cobreña, y por el lado del llano, la seja: q. todabia ecsisten de manifiesto, las ruinas de las casas y corrales, q. el, puede enseñarlas y aunq. hace muchos años q. no handa en aquel lugar, pero cree q. todabia puede (enseñarlas) señalar los linderos q. se reconocian desde anterior. Que es todo lo q. sabe sobre las preguntas q. se le han hecho, y lo dicho es la verdad, de cuanto se le ha preguntado y puede decir en fe de la promesa q. tiene otorgada; y leida q. le fué, en ella se afirma y ratifica; y no firmó por no saber, lo hizo el Juez con los de Asista. poniendo el testigo una cruz. Doy fé.

ALEJO MARTINEZ. [Un signo de cruz.]
BENTURA LOPEZ.

A.
FRANCO. BARRON.
A.
FELIX LERMA.

Y luego presente el C. José Abalos, bajo la promesa de la ley q. prestó, ofreció decir verdad, en lo q. supiere y fuere preguntado; y siendolo por sus generales, dijo: llamarse como queda dicho, de estado casado, edad mayor de 60 años, oficio labrador, natural de esta Villa, C. A. R.

A la 4a. pregunta, dijo: q. ha serbido mas de diez años, á la familia de los Señores Garcia en diferentes ocupaciones, por cuyo motibo estubo algunos años antes de 1820, en el rancho de Santa Teresa, donde los Señores Garcia tenian su caballada, ganado mayor y menor, de los cuales el declarante fué pastor.

A la 5a. pregunta dijo: q. conoció las dibersas piezas de adobe de la casa pral. del rancho de Santa Teresa, los corrales, y algunos jacales de palos, donde vibian los sirbientes, en los cuales tambien vibió el q. habla; q. era muy sabido y notorio q. uno de los linderos, está en el ancon abajo de piedras paradas; por el lado de abajo serbia de linea el rio; por el lado del Norte, atrabesaba el lindero en el rincon de la cobreña, y por el lado del llano, la seja, todabia ecsisten de manifiesto las ruinas de las casas y corrales, q. el puede enseñar, por q. conoce muy bien el paraje, y todos los linderos del rancho de Santa Teresa. Que es, cuanto puede decir, sobre las preguntas q. se le han hecho, y en fé de la promesa q. tiene dada; y en ella leida q. le fué, se afirmó y ratificó; y por no saber firmar puso un signo de cruz, firmando el Juez con los de Asistencia. Doy fé.

JOSÉ ABALOS. [Un signo de cruz.]
BENTURA LOPEZ.

A.
FRANCO. BARRON.
A.
FELIZ LERMA.

En siguid presente el C. Julian Alday, hizo promesa de decir verdad en lo q. supiere y fuere preguntado; y siendolo por su nombre y generales, dijo: llamarse como queda dicho, estado casado, edad 56 años, oficio labrador, natural de esta Villa, C. A. R.

A la 4a. pregunta dijo: q. ha serbido mas de 20 años á la familia de los Señores Garcias, en diferentes ocupaciones por cuyo motibo estubo sirbiendoles en el rancho de Santa Teresa, donde los Señores Garcias tenian su caballada, ganado nayor, y menor.

A la 5a. pregunta dijo: q. muy bien conoció las dibersas piezas de adobe de la casa pral. del rancho de Santa Teresa, y algunos jacales de palos, donde vibian los sirbientes, en q. tambien vibia el deponente, q. era sabido y notorio q. uno de los linderos, está en el ancon abajo de piedras paradas por el lado de abajo serbia de linea el rio, por el lado del norte atrabesaba el lindero en el Rincon de la Cobreña; y por el lado del llano, la seja; q. todabia estan de manifiesto las ruinas de las casas y corrales, q. el declarante puede enseñar por q. los conoce muy bien. Que es cuanto tiene q. decir sobre las preguntas q. se le hacen, y en fé de la promesa q. ha prestado; y en ellas leidas q. le fueron, se afirmó y ratificó; y por no saber firmar hizo un signo de cruz, y firmó el presente Juez, con los testigos de Asista. Doy fé.

JULIAN ALDAY. [Un signo de cruz.]
BENTURA LOPEZ.

A.
FRANCO. BARRON.
A.
FELIZ LERMA.

VILLA DEL PASO, *Enero 12 de 1853.*

En vista de la precedente informacion, con la q. el Albacea Dn. José Maria Garcia, ha justificado legalmente la posecion q. por muchos años han tenido en al rancho llamado Santa Teresa, arriba de la presa de esta Villa y del Ancon de Muleros, y apareciendo q. aun han tenido títulos de dicha propiedad y q. estos han corrido estrabio, y por lo q. resulta del testamento é informacion, se le dá al Albacea Dn. José Maria Garcia, por si, y á nombre de los coherederos sin perjuicio de tercero q. mejor derecho prueba, la posecion real, actual, corporal, ó la q. mejor corresponde en derecho, por haber poseido desde tiempo inmemorial, en el rancho de Santa Teresa, con el gose y aprobechamiento de los ter-
11 renos, leñas, y pastos, y demas producciones q. haya en dicha pertenencia, y en ellas se le manda amparar y defender, prebiniendo q. nadie lo inquiete ni moleste en dicha posecion y uso libre q. le combenga hacer de ella, sin ser antes oido y vencido en juicio; y para cumplir este mandamiento prevengase al referido Dn. José Ma. Garcia, q. para el dia 16 del corriente mes, concurra al sitio demarcado con el Juez y los testigos, llebando consigo una ó dos personas q. puedan señalar los linderos viejos. El Juez 2o. y de 1a. Insta. del Canton Brabos, Asi lo decretó dispuso, y firmé, con los testigos de Asista. Doy fé.

BENTURA LOPEZ.

A.
FRANCO. BARRON.
A.
FELIZ LERMA.

En la Villa del Paso del Norte, á los diez y seis dias del mes de Enero de mil ochocientos cincuenta y tres, Bentura Lopez, Juez 2o. y de 1a. Ynstancia de este Canton Brabos, acompañado de mis testigos de Asista.

y los instrumentales q. despues se dirán, con citacion de la parte, y en cumplimiento del decreto fecha 12 del corriente mes, con el interesado Dn. José Maria Gracia, y el antiguo sirbiente Alejo Martinez, puestos en el Ancon de piedras paradas, se midió un cordel de á 50 varas, en la vara de comercio, y se me enseñó por lindero antiguo, por el interesado, y el practico Alejo Martinez, un alamo grueso en la orilla de rio, q. tiene en su alrededor, cortadas al proposito algunas partes de la cascara; y de este punto siguiendo pa. arriba, de Sur á Norte, se midieron cuatrocientos cordeles (400) de á cincuenta varas; lindando por el costado del Oriente, con el Rio Brabo, alcansando la medida, á un alamo situado en la orilla del rio, serca de unas lomas de arena con tres ó cuatro matas de palmilla, q. se encuentran dentro del rincon de la Cobreña, cuyo alamo se marcó por lindero quitandole cascaras nasta penetrar al sentro de la madera. De este punto voltió la medida de Oriente á Poniente por el costado del Norte, y se midieron cien (100) cordeles de á cincuenta varas, q. alcanzaron hasta arriba de la ceja, en un montecillo de ojasén, en cuyo punto se puso por mohonera, un monton de piedras; volteando la medida de Norte, á Sur, por el costado del Poniente, se midieron cuatrocientos (400) cordeles, por sobre las lomas y serca de la seja; y alcanzaron á un bajio de las lomas y la seja, donde se puso por mohonera, un monton de tierra; y volteando la medida de Poniente á Oriente rumbo al rio se midieron (100) cordeles, de á cincuenta varas, encontrand el alamo grueso, q. quedo marcado como primer mohonera. Y en testimonio de verdadera posecion, le entré por la mano derecha al albacea Dn. José Maria Garcia, 12 en las cuatro leguas q. estan comprendidas en la medida q. se ha practicado, y dentro de los linderos antiguos, q. se me demarcaron; lo pasié por ellas, y lo mandé q. hiciese salir los q. estaban dentro de dicha pertenencia; y en esta posecion, dispuse q. se le ampare y defienda á el, y sus coherederos y subsesores, mientras no sean vencidos en juicio; mandando q. se imponga á los q. perturben en esta posecion, las penas de la ley; con cuyas diligencias concluyó esta medida, resultando una figura de la tierra, como el mapa q. se agrega á esta posecion; dispuse igualmente q. se dén al interesado las copias q. solicite de estas diligencias, Archibando las originales en los registros de mi officio; y firmando esta posecion Judicial, con mis testigos de Asistencia, Franco. Barron, y Feliz Lerma, los instrumentales, Pedro Trujillo, José Beanes, y Jacobo Ugarte, y el practico Alejo Martinez, todos presentes y vecinos de esta Villa, en este papel comun por falta del sellado correspondiente q. repondrá el interesado cuando lo haya. Doy fé.

BENTURA LOPEZ.

A.
FRANCO. BARRON.
A.
FELIZ LERMA.
Ynstrumental.
PEDRO TRUJILLO.
Y.
JOSÉ BEANES.
Y.
JACOBO UGARTE.
Practico.
ALEJO MARTINEZ. [Un signo de cruz.]

Es copia fielmte. sacada de los originales q. obran en este protocolo en estas cuatro fs. de papel comun, q. repondrá el interesado; queda ecsactamente de donde se sacó cuatro dias despues de su otorgamiento en esta Villa del Paso del Norte. Doy fé.

BENTURA LOPEZ. [Rúbrica.]

A.

FRANCO. BARRON. [Rúbrica.]

A.

FELIZ LERMA. [Rúbrica.]

(Here follows diagram marked p. 13.)

14 *To 2nd Civil Judge of the Canton:*

José Maria Garcia, resident of this town, and testamentary executor, with power in solidum, according to the tenth clause of the testament executed by my deceased mother on the 29th day of the month of March, 1848, as is seen by the testament, which I present, and which I ask to be returned to me after said clause has been examined, appear before you and say:

That there yet remains without having been distributed among the heirs of my deceased mother the ranch called Santa Teresa, up the river from this town. The documents therefor I lost, together with other papers and effects, when the American forces took possession of this town, piercing the walls of my house and occupying the same constantly with troops, as was notorious, and in order to supply in some manner the lack of the original documents, and there existing in this town respectable persons who saw that said documents were the titles to the four tracts of land for raising large stock (sitios de ganado mayor), which prior to the year 1790, of the last century, were possessed by my father, and thereafter we occupied the same until the Indians made us leave there, and there still existing some servants of those who worked in our service on the ranch, and it being notorious that the said ranch has been recognized for many years as the legal property of the house of my parents, which I represent, I may ask of you, in view of my representative capacity and under oath, that you be pleased to interrogate Don Francisco Rascon, Don Guadalupe Miranda, Don José Maria Maese, Alejo Martinez, José Abalos, and Julian Alday according to the tenor of the following interrogatories:

1st. To give their names and all other circumstances required by law.

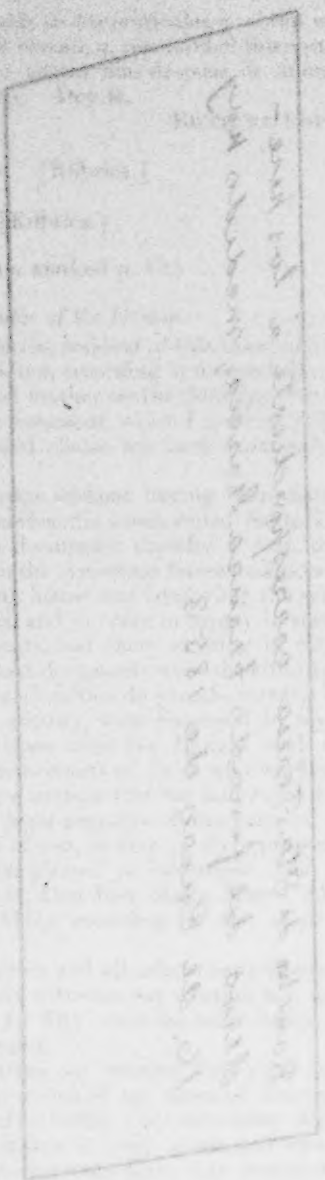
2nd. That the said six witnesses say whether it is notorious and public that we have occupied for fifty years the ranch called Santa Teresa with our live stock and servants.

3rd. That the first three say whether they know that they have seen the original titles to the ranch of my deceased father, Francisco Garcia, called Santa Teresa, and whether they remember that it contained four tracts of land for the raising of large stock, and whether it is notorious that at the American invasion my house was occupied by United States forces, and that I lost these and other documents.

4th. That the three last say whether they were in the service of our family for more than twenty years, and therefore lived on our ranch—the Santa Tearesa.

Rancho de Sta. Teresa, correspondiente á los herederos del finado Francisco Garcia, medido hoy 16. de Enero de 1853.

No. 211.
U. States
v.
Rindell
p. 13



5th. To say whether they know the houses that were on said
15 ranch, the corrals, and the recognized boundaries of said property.

And this judicial inquiry having been concluded, and there resulting thereby the establishment of the original boundaries, I ask the judge to give me the possession which by law to me corresponds, in the name of the Garcia heirs, my brothers and sisters, all of whom are children of Francisco Garcia and Josefa Horcasitas—José Maria, Doña Guadalupe, Francisco, Doña Jesus, Rafael, and Pedro, who have reached their majority, and José, Cenuto, and Vicente, deceased in their infancy, as set forth and declared in the third clause of the said testament, in which possession you will be pleased to order us to be protected and defended without being disturbed or molested by anyone, unless heard in court, and in order that said possession may serve us and our heirs as title and security.

It is justice which I ask, protesting that I do not proceed in bad faith, and requesting that the present writing be admitted on common paper, there being none of the proper stamp.

JOSÉ MARIA GARCIA.

Town of Paso del Norte, January 7, 1853.

TOWN OF PASO DEL NORTE, *January 9, 1853.*

This petition admitted together with the testament accompanying, dated March 29, 1848 (and I, the judge, certify that I have before me a legal testament of the said date, in the tenth clause of which to me it is manifest that José Maria Garcia is instituted as first executor in solidum, in the testament of his deceased mother, Josefa Horcasitas de Garcia), and there is also set forth the institution of her heirs in clause third, in which are mentioned as her and her husband's, Francisco Garcia, legal heirs, José Maria Doña Guadalupe, Francisco, Doña Jesus, Rafael, and Pedro, which testament is returned to the executor, and as to the judicial inquiry asked for by the petitioner, the witnesses named will be cited to appear on the eleventh of the current month, and decision will be rendered in accordance with the facts.

Thus it was decreed, ordered, and signed by the 2nd judge and of 1st instance of this town, citizen Bentura Lopez, with his assisting witnesses. I certify.

BENTURA LOPEZ.

Assisting witness:
FRANCISCO BARRON.
Assisting witness:
FELIZ LERMA.

16 The executor José Maria Garcia, having been notified of the foregoing decree, said that he heard and understood it, and he signed it with the judge and the assisting witnesses. I certify.

JOSÉ MARIA GARCIA.
BENTURA LOPEZ.

Assisting witness:
FRANCISCO BARRON.
Assisting witness:
FELIZ LERMA.

JANUARY 11, 1853.

Present, Francisco Rascon, and under the oath which he took according to law, under which he offered to speak the truth as far as he knew and might be interrogated, said: That his name was as aforesaid; that he is over sixty years of age; a native of the district of Concepcion; that he came to this town in the year 1813; by occupation, a farmer; not disqualified; religion, Apostolic Roman Catholic.

To the second interrogatory, it having been read to him, he said: That from the year 1813 he has known the ranch of Francisco Garcia, called Santa Teresa, by which the road leading to the upper colonies passes, because he was there several times before it was abandoned on account of the incursions of the Indians; that when he came to this town he heard trustworthy persons say that the Santa Teresa ranch was an old property of Francisco Garcia, whom he sometimes saw on said ranch, with his servants and herds.

In reply to the third interrogatory, he said: That he had had in his hands many times the possession and original documents of the Santa Teresa ranch, authenticated by one of the lieutenant-governors that governed in this district about the close of the last century; that by reason of his father having been an employee in this town, shortly after 1821, he saw the possession of the said ranch on file in the archives of his father's office, and although he does not remember the date he can affirm that said possession was for from three to five leagues, which documents he knows were lost when the Americans took possession of the archives of this town, and occupied the house of José Maria Garcia. That what he has said is the truth touching the questions put to him and which he affirms and ratifies under the oath he has taken. Signing with the judge and assisting witnesses. I certify.

FRANCISCO RASCON.
BENTURA LOPEZ.

Assisting witness:
FRANCISCO BARRON.
Assisting witness:
FELIZ LERMA.

17 And thereafter appeared Guadalupe Miranda, to whom I administered the oath in due form of law, and under which he offered to speak the truth as far as he might know and might be questioned. He said: That his name was as stated; that he was forty years of age; a native of this town; merchant; not disqualified; religion, Apostolic Roman Catholic.

To the second interrogatory, he said: That it has been notorious in this town that for some years the deceased Francisco Garcia and his children possessed and occupied with their herds the Santa Teresa ranch, situated above this town.

To the third interrogatory he said: That he has been informed by trustworthy persons that *the* had seen some documents of such possession; that it *it* is a notorious fact that at the time of the occupation of this town by the American forces said forces took a part of the public archives; that they occupied José Maria Garcia's house, from which they took some documents relating to his property and papers of importance,

among which it is assured were the documents of said ranch, which ranch, according to his recollection, he was informed, comprised a body of four leagues; that that which he has said is the truth touching the questions put to him, and the same having been read to him he affirmed and ratified it under the oath he had taken and he signed with the judge and assisting witnesses. I certify.

GUADALUPE MIRANDA.
BENTURA LOPEZ.

Assisting witness:
FRANCISCO BARRON.
Assisting witness:
FELIZ LERMA.

Immediately thereafter José Maria Maese appeared, and in conformity with law made oath to speak the truth as to what he knew and might be asked, and being asked his name and all other circumstances by law required, he said: That his name was as stated; that he is over forty years of age; a native of this town; a farmer; not disqualified; religion, Apostolic Roman Catholic.

To the second interrogatory he said: That he had been at the Santa Teresa ranch several times; that it belonged to Francisco Garcia; that it is above this town; that when he was very young he had heard it said by respectable old persons that the said Francisco Garcia had had his stock on the said ranch since about the latter part of the last century.

To the third interrogatory he said: That he remembered to have seen the title papers to the Santa Teresa given by a lieutenant governor
18 of this town in the time of the Spanish rule; that he does not remember the date of said documents, but he is certain that they comprised a donation of four leagues; that it is notorious that the American forces, and also the Mexican, abstracted a part of the archives of this town in the years of 1847 and 1848, and also that the Americans occupied the house of José Maria Garcia, from whom they took some important papers, and he knows from creditable persons that in said years the Messrs. Garcia lost the documents they had relating to Santa Teresa; that what he has said is the truth in answer to the interrogatories propounded to him, and he affirms and ratifies the same under the oath he has taken and he signs with the judge and his assisting witnesses. I certify.

JOSÉ MARIA MAESE.
BENTURA LOPEZ.

Assisting witness:
FRANCISCO BARRON.
Assisting witness:
FELIZ LERMA.

The citizen Alejo Martinez, being present, under the oath of the statute which he took according to law promised to speak the truth as far as he knew and might be interrogated, and on being asked his name and the other general questions he said: That his name was as stated; a widower; age, sixty years; occupation, laborer; native of this town; Apostolic Roman Catholic.

Being interrogated to the fourth interrogatory, he said: That he had served for more than twenty years in the family of the Messrs. Garcia in different capacities, for which reason he was for some years prior to 1820 on the Santa Teresa ranch, where the Messrs. Garcia had their herds of horses and large and small stock.

In answer to the fifth interrogatory he said: That he knew the several adobe buildings of the principal house of the ranch of the Santa Teresa, the corrals, and the shanties built of poles for the servants; that it was well known and notorious that one of the boundaries is in the lower bend of the piedras paradas; that on the lower side the river served as a boundary line; on the north side the boundary line crossed the Cobreña bend, and on the side of the plain the ridge (ceja); that the ruins of the houses and corrals are still plainly to be seen, and that he can point them out, and although it is many years since he has been to the place he believes he can yet designate the boundaries formerly recognized; that that is all he knows touching the questions propounded to him;
19 that what he has said is the truth in regard to all that he has been asked and can say under the promise he has given; and the same having been read to him he affirms and ratifies it, and he did not sign, not knowing how; the judge signed for him with his assisting witnesses, the witness making a cross. I certify.

ALEJO MARTINEZ. [A cross.]
BENTURA LOPEZ.

Assisting witness:
FRANCISCO BARRON.
Assisting witness:
FELIZ LERMA.

And thereupon the citizen José Abalos, being present, under the promise of law, which he gave, offered to speak the truth as to what he knew and might be interrogated, and upon being asked the legal questions, he said: That his name was as stated; that he was married; age, over sixty years; occupation, laborer; native of this town; Apostolic Roman Catholic.

In answer to the fourth interrogatory he said: That he had served for more than ten years the family of the Messrs. Garcia in different capacities, for which reason he had for some years prior to 1820 lived at the Santa Teresa ranch, where the Messrs. Garcia had their herds of horses and large and small stock, of which deponent was shepherd.

To the fifth interrogatory he said: That he knew the several adobe constructions of the principal house of the Santa Teresa ranch, the corrals, and the shanties built of poles where the servants lived, and in which the deponent also lived; that it was well known and notorious that one of the boundaries is in the lower bend of the piedras paradas; on the lower side the river served as a boundary line; on the north side the line crosses the Cobreña bend, and on the plain the brow (ceja); the ruins of the houses and corrals are still clearly to be seen; that he can show the same, for he knows the place well, and all the boundaries of the Santa Teresa ranch; which is all that he can say in reply to the questions propounded to him under the promise he has made; and the same having been read to him he affirms and ratifies it, and not knowing how

to sign he made a cross, the judge signing with the assisting witnesses. I certify.

JOSÉ ABALOS. [A cross.]
BENTURA LOPEZ.

Assisting witness:
FRANCISCO BARRON.
Assisting witness:
FELIZ LERMA.

Following, citizen Julian Aldey being present, he promised to
20 tell the truth as to what he knew and might be asked, and being asked his name and the general questions, he said: That his name was as stated; that he is a married man; fifty-six years of age; occupation, laborer; Apostolic Roman Catholic.

To the fourth interrogatory he answered: That he has served for more than twenty years the family of the Messrs. Garcia in different capacities, and for that reason have served on the ranch of Santa Teresa, where the family of the Messrs. Garcia had their herds of horses and large and small stock.

To the fifth interrogatory he said: That he knew well the several adobe buildings of the principal house of the Santa Teresa ranch, and some shanties built of poles in which the servants lived; that it was well known and notorious that one of the boundaries is at the lower bend of the Piedras Paradas, on the lower side the river served as a boundary, on the north side the line crossed at the Cobreña bend, and on the side of the plain the brow (ceja); and that the ruins of the houses and corrals are still plainly visible; that the deponent can point them out, for he knows them very well, and that is all he has to say in relation to the questions asked him under the promise he has made. And the same having been read to him he affirmed and ratified it, and not knowing how to sign he made a sign of a cross, and the present judge signed with the assisting witnesses. I certify.

JULIAN ALDAY. [A cross.]
BENTURA LOPEZ.

Assisting witness:
FRANCISCO BARRON.
Assisting witness:
FELIZ LERMA.

In view of the foregoing judicial inquiry with which the executor, José Maria Garcia, has proved legally the possession that for many years they have had of the ranch called Santa Teresa, above the dam of the town and the Muleros bend, and it appearing that they have even had titles to said property and these have been lost, and from what appears from the testament and judicial inquiry there is given to the executor, José Maria Garcia, for himself, and in the name of the coheirs, without prejudice to any third party proving a better right, the real, actual, personal, corporal possession, or that which better corresponds in law, by reason of immemorial possession of the Santa Teresa ranch, with the enjoyments and benefits of the lands, woods, and pastures, and all other products to be found on said premises, and it is ordered that he be protected and

defended therein, warning all not to interrupt or molest him in
21 said possession and free use that he may deem fit to make thereof,
without he being first heard and judgment rendered against him in court after a trial; and for the fulfilment of this mandate the said José Maria Garcia will on the sixteenth day of the current month repair to the tract of land designated, with the judge and witnesses, taking with him one or two persons who can point out the old boundaries. The 2nd judge and of 1st instance thus decreed, directed, and signed with the assisting witnesses. I certify.

BENTURA LOPEZ.

Assisting witness:
FRANCISCO BARRON.
Assisting witness:
FELIZ LERMA.

At the town of Paso del Norte, on the sixteenth day of the month of January, one thousand eight hundred and fifty-three, I, Bentura Lopez, 2nd judge of 1st instance of this Canton Bravos, accompanied by my assisting witnesses and the instrumental witnesses hereinafter named, with citation of the party in interest, and in compliance with the decree dated the 12th of the current month, with the party in interest, José Maria Garcia, and the old servant, Alejo Martinez, being at the bend of the Piedras Paradas, there was measured a cordel of fifty varas of the commercial vara, and there was shown as the old boundary by the party in interest and the guide Alejo Martinez, a large cottonwood on the margin of the river, from which there had been cut purposely some parts of the bark from around it, and from this point, going upwards from south to north, there were measured four hundred cordels of fifty varas, bounded on the east side by the Rio Bravo, the measure reaching to a cottonwood standing on the river bank near some sand hills with three or four palmetto plants which were found in the bend of the Cobreña, which cottonwood was marked for a boundary by taking from it the bark and cutting to the centre of the wood. From this point the measurement was turned from east to west on the north side, and there were measured one hundred cordels of fifty varas, which reached beyond the brow (ceja) to a small growth of ojasen (senna bushes?), at which point was placed as a landmark a pile of stones; turning the measurement from north to south on the west side there were measured four hundred cordels over the hills and near the brow (ceja), reaching a hollow in the hills and brow, at which place a mound of earth was made for a landmark; and turning the measurement from west to east in the direction of the river there were measured one hundred cordels of fifty varas reaching the large cottonwood which was
22 marked for the first landmark. And in testimony of true possession I led the executor, Don José Maria Garcia, by the right hand upon the four leagues which are contained within the measurement executed, and within the old boundaries which were pointed out to me; I led him over them and I directed him to make those who were on the said premises leave them; and in this possession I ordered that he and his coheirs and successors be protected and defended so long as judgment be not rendered against them by a court after a trial; and ordering that

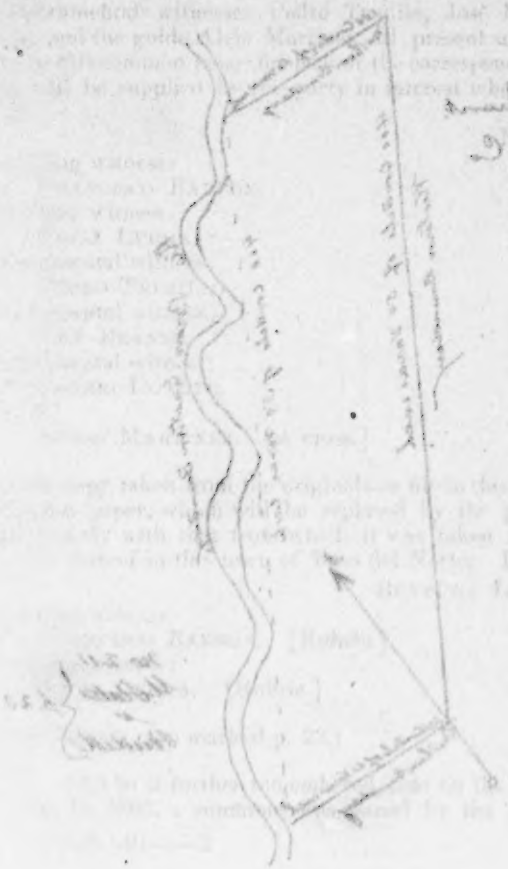


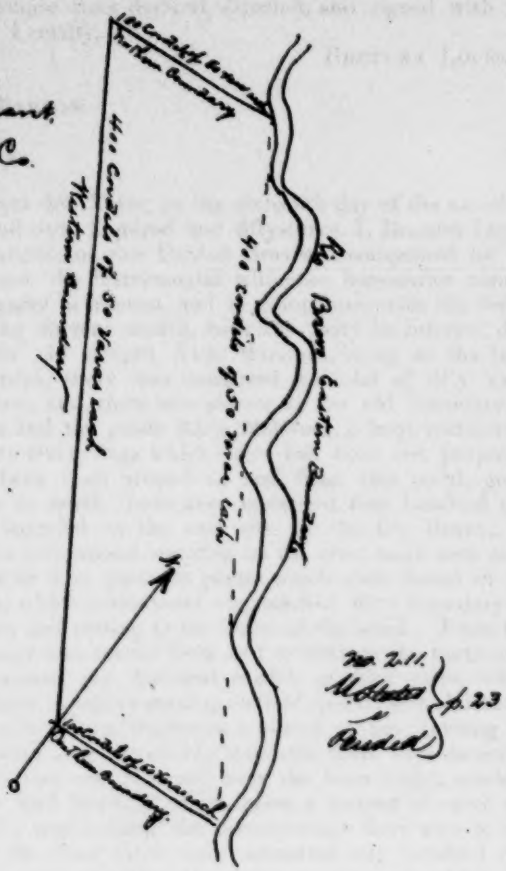
Exhibit B

Sketch Map

Santa Teresa Grant.

Doña Ana Co.

-N.M-



there be imposed upon those who may interrupt him in this possession the penalties of the law; with which proceeding this measurement was ended, there resulting therefrom the configuration of the land as is shown by the map attached to this possession; I also directed that there be given to the party in interest such copies of these proceedings as he may solicit, placing in the archives of my office the originals, signing this judicial possession with my assisting witnesses Francisco Barron and Feliz Lerma, the instrumental witnesses Pedro Trujillo, José Beanes, and Jacobo Ugarte, and the guide Alejo Martinez, all present and residents of this town, on this common paper for lack of the corresponding stamped paper, which will be supplied by the party in interest when it can be had. I certify.

BENTURA LOPEZ.

Assisting witness:
FRANCISCO BARRON.
Assisting witness:
FELIZ LERMA.
Instrumental witness:
PEDRO TRUJILLO.
Instrumental witness:
JOSÉ BEANES.
Instrumental witness:
JACOBO UGARTE.
Guide:
ALEJO MARTINEZ. [A cross.]

A true copy taken from the originals on file in this office on four leaves of common paper, which will be replaced by the party in interest; it agrees exactly with that from which it was taken four days after the execution thereof in this town of Paso del Norte. I certify.

BENTURA LOPEZ. [Rubric.]

Assisting witness:
FRANCISCO BARRON. [Rubric.]
Assisting witness:
FELIZ LERMA. [Rubric.]

(Here follows map marked p. 23.)

24 And be it further remembered, that on the 25th day of March, A. D. 1893, a summons was issued by the clerk of said court,

which summons, with all endorsements thereon, is in the following words and figures, to wit:

25 FORM No. 167.
U. S. Court of Private Land Claims.

Summons.

In the U. S. Court of Private Land Claims.

UNITED STATES OF AMERICA,
District of New Mexico, ss.

M. R. PENDELL ET AL., PLAINTIFF,
versus
THE UNITED STATES OF AMERICA, defendant.

Petition filed in the clerk's office this 2d day of March, A. D. 1893.

The President of the United States of America to Matt. G. Reynolds, esq., greeting:

You, and each of you, are hereby notified that an action has been brought in said court, by M. R. Pendell et al, plaintiff, against you as defendant, under the provisions of the act of the Congress of the United States entitled "An act to establish a Court of Private Land Claims and to provide for the settlement of private land claims in certain States and Territories," approved March 3, 1891, and that a copy of the petition of said plaintiff is herewith attached and served upon you, and that you are required to appear and plead, demur, or answer to the petition filed in said action, in said court, within thirty days from the date of service of this summons upon you; and if you fail so to do the said plaintiff will take default according to the provisions of the aforesaid act.

Witness, the honorable Joseph R. Reed, chief justice of the Court of Private Land Claims, and the seal of the said court, at the city of Santa Fe, in said district, this 25th day of March, A. D. 1893, and of the independence of the United States the 117 year.

[SEAL.] JAMES H. REEDER,
Clerk.
By IRENEO L. CHAVES,
Deputy Clerk.

26 *Proof of service.*

UNITED STATES OF AMERICA,
District of New Mexico, ss.

APRIL 1st, A. D. 1893.

I hereby certify that I received the within writ on the day of April, A. D, 1893, and that I have personally served the same upon the said defendant U. S. by delivering to—Served on me this the 3 day of April, 1893.

MATT. G. REYNOLDS,
U. S. Attorney.

This writ, therefore, returned April 21st, as the law directs, this 21st day of April, A. D. 1893.

TRINIDAD ROMERO,
Marshal.
By SERAPIO ROMERO,
Deputy Marshal.

MARSHAL'S FEES.

Service defendant's, at $2..... $
Mileage miles at 6c., going only.....
1 summons..... 4.00

Total.....$4.00 Paid by

(Indorsed:) Gen. No. 168. U. S. Court of Private Land Claims, district of New Mexico. M. R. Pendell et al., plaintiff, versus The United States of America, defendant. Summons. Filed this 21st day of April, A. D. 1893. James H. Reeder, Clerk. By Ireneo L. Chaves, deputy clerk. Catron and Coons, of Santa Fe, attorneys for plaintiff.

27 And be it further remembered that thereafter, to wit, on the 29th day of December, A. D. 1896, there was filed in the office of the clerk an answer, which answer is in words and figures following, to wit:

28 UNITED STATES OF AMERICA, *ss:*

In the Court of Private Land Claims, Santa Fe district, August term, 1896.

M. R. PENDELL ET AL., COMPLAINANTS,
vs.
UNITED STATES, DEFENDANT.
} No. 168. Santa Teresa grant.

Answer.

Comes now the United States, by its attorney, Matt. G. Reynolds, and for answer to the petition filed in the above-entitled cause says:

That as to the several matters and things alleged in said petition defendant has no knowledge or information sufficient to enable it to form a belief as to the truth thereof, and it accordingly denies each and all of said allegations, and prays that complainants be put to their proof of the same, as is provided by the act establishing this court.

And this defendant, further answering, denies that the complainant is entitled to the relief, or any part thereof, in his petition alleged and prayed for, and prays the same advantage of this answer as if it had pleaded or demurred to the said petition.

Now, having fully answered, it prays the court that a decree may be entered rejecting the claim for said alleged grant and dismissing the petition and for such other orders as to the court may seem meet and proper and which it may be authorized to make in the premises.

MATT. G. REYNOLDS,
U. S. Attorney.

(Indorsed:) Case No. 168. File No. Court of Private Land Claims. M. R. Pendell et al., complainant, vs. The United States, defendant. Santa Teresa grant. Answer. Filed in the office of the clerk, Court of Private Land Claims, Dec. 29, 1896. Jas. H. Reeder, clerk. Matt. G. Reynolds, U. S. Attorney.

29 And be it further remembered that thereafter, to wit, on the 23' day of February, A. D. 1897, there was filed in the office of the clerk an appearance, which appearance is in words and figures following, to wit:

In the United States Court of Private Land Claims, sitting in and for the Territory of New Mexico.

M. R. PENDELL ET AL.
vs.
THE UNITED STATES. } No. 168.

Now comes Noyes Rand, James H. White et al., who claim adverse to the plaintiffs herein, and hereby enter their appearance, by their solicitor, as defendants in said cause.

NOYES RAND,
JAMES H. WHITE ET AL.,
By JOHN R. M FIE,
Their Solicitor.

30 And be it further remembered that thereafter, to wit, on the 29th day of August, A. D. 1899, being the 7th day of the August term of said court, 1899, held at Santa Fe, in the Territory of New Mexico, the following proceedings were had:

M. R. PENDELL ET AL.
vs.
UNITED STATES. } No. 168. Santa Teresa grant.

The above-entitled cause now coming on to be heard, there appeared T. B. Catron, esq., for the claimants, and W. H. Pope, esq., appearing for the United States; the parties announcing themselves ready, the trial of the cause was proceeded with. The hearing of the cause not being completed, the same was continued until the following day, when, on said day, to wit, the 30th day of August, the court resumed its consideration of the cause and, after hearing the argument of the counsel, the court took the same under advisement.

31 The evidence, both oral and documentary, offered and introduced on the trial is as follows, to wit:

32 In the Court of Private Land Claims, adjourned August term, 1899, Santa Fe, New Mexico.

M. R. PENDELL ET AL.
versus
UNITED STATES. } No. 168. Santa Teresa grant.

On August 29th, 1899, the above-entitled case came up for hearing and the following proceedings were had therein in open court:

Appearances: Mr. T. B. Catron appeared for the plaintiffs; Mr. Matt. G. Reynolds, U. S. attorney, and Mr. W. H. Pope, assistant U. S. attorney, appeared for the Government.

Mr. POPE. By agreement between Mr. Catron and myself it is stipulated that abstracts of the following papers may be introduced in lieu of the documents themselves, marked as follows: Plaintiffs' Exhibit No. 1, deed from J. N. Escobar to Jesus Escobar; plaintiffs' Exhibit No. 2, a deed of trust from J. Escobar to George B. Zimpelman; plaintiffs' Exhibit No. 3, a deed of trust from J. Escobar to J. C. Beatty; plaintiffs' Exhibit No. 4, a deed from Joseph F. Bonham, special master in chancery, to M. R. Pendell, executed December 24th, 1894.

Mr. CATRON. It is admitted by the claimants that the Jesus Escobar who appears in the conveyance from J. M. Escobar to Jesus Escobar, and the J. Escobar who appears in the deed of trust of J. Escobar to George B. Zimpelman is the same person that was the Mexican consul at El Paso, Texas, and was otherwise known as Jesus Escobar y Armendaris.

Mr. POPE. We desire to introduce in evidence the petition before the surveyor-general in this case, petition of claimants before the surveyor-general, in paper marked No. 1, file No. 115, reported No. 111. (Defendant's Exhibit A.)

We also desire to put in evidence the muniments of title in the Refugio Colony case, reported No. 90. (Defendant's Exhibit B.)

33 Also translation of same. (Defendant's Exhibit BB.)

Mr. CATRON. I object to that paper not because of lack of genuineness of the signatures, but I object to it because it is not proper evidence in this case; it has no tendency to prove or disprove the validity of this grant, and besides, the introduction of it is undertaking to inject into this case a matter which the act itself under which this court is acting prohibits this court from looking into a contest question between two grants, and in addition to that, the paper itself shows that all the lands embraced in the Refugio Colony case is practically commons.

Mr. POPE. We desire to introduce in evidence the petition filed in case No. 139, of this court, for the confirmation of the Guadalupe Miranda grant (defendant's Exhibit C), and the muniments of title in same case (defendant's Exhibit CC), and the decision of this court rejecting that grant because of a failure to prosecute the claim. (Defendant's Exhibit CCC.) Also sketch map filed in said case. (Defendant's Exhibit D.)

Mr. CATRON. I object to this paper not because Miranda's signature is not genuine, but object to it for all the reasons given in my objection to the Refugio Colono case papers introduced. I introduce in evidence the original grant papers (marked plaintiffs' Exhibit A) and all the other testimony which has been taken before any of the justices of this court on behalf of the claimants; all the testimony taken herein is introduced, together with the muniments of title.

SANTA FE, *New Mexico, August 29th, 1899.*

I hereby certify that the above and foregoing two pages contain a full, true, and correct transcript of all my shorthand notes taken in open court on the trial of the above-entitled case.

W. J. MCPHERSON.
Official Stenographer.

34 In the Court of Private Land Claims, Santa Fe, New Mexico, January term, 1898.

M. R. PENDELL ET AL. vs. UNITED STATES. } No. 168. Santa Teresa grant.

Depositions taken before Hon. Wilbur F. Stone, associate justice, in the above-entitled case, in the city of El Paso, Texas, on the 11th day of March, 1898.

Mr. T. B. Catron, for the plaintiffs; Mr. Wm. H. Pope, assistant U. S. attorney, for the Government.

JUAN ABALOS, a witness of lawful age, being produced, sworn, and examined on the part of the plaintiffs, testified upon direct examination by Mr. Catron, as follows:

Q. What is your name?
A. Juan Abalos.
Q. Where do you reside?
A. I live in Dona Ana.
Q. In the county of Dona Ana and Territory of New Mexico?
A. Yes.
Q. What is your age?
A. I am about 64 years old. I was born in the year '36.
Q. Do you know Jose Maria Garcia?
A. Yes.
Q. Do you know whether he is living or dead?
A. He is dead.
Q. Whose son was he?
A. Juan Antonio Garcia.
Q. Do you know what his mother's name was?
A. No.
Q. Did you ever hear of a woman named Dona Josefa Horcasitas Garcia?
A. Yes.
Q. What relation was she, if any, to Jose Maria Garcia?
A. I think she may have been his sister-in-law; I do not know.
Q. You did not know her?
A. No.
Q. Do you know whether Jose Maria Garcia had any brothers or sisters?
A. No.

35 Q. Do you know a tract of land called the ranch or grant Santa Teresa?
A. Yes.
Q. Were is it situate?
A. Here; north [points in a northerly direction].
Q. Is it in New Mexico or Texas?
A. In New Mexico.
Q. On which side of the Rio Grande?
A. On the other side of the river.
Q. Do you mean west or east side?

A. On the west.
Q. Do you know the boundaries of that grant?
A. Yes.
Q. When did you first know that property?
A. Since the year '50.
Q. How did you happen to know it in the year '50?
A. That Don Jose Maria was living there.
Q. Jose Maria who?
A. Jose Maria Garcia.
Q. What were you doing there in 1850?
A. I was working for him; I worked for the period of one month for him.
Q. Who was living there with Jose Maria Garcia at that time?
A. His workingmen.
Q. Did he have an overseer there?
A. Yes.
Q. Who was his foreman?
A. Juan de Dios.
Q. Did he have a wife there with him?
A. Yes.
Q. What kind of houses had he there?
A. He had some wooden houses before.
Q. But when you were there, what were there?
A. There was one of them was an adobe house then.
Q. How were those houses; were they old houses or new ones?
A. They were new wooden houses.
Q. Were there any old houses there?
A. Yes.
Q. At what point were those houses?
A. At the place called the La Isla.
36 Q. Do you know what the southern boundary of this grant is?
A. Yes.
Q. What is the point of boundary on the south side of this property at or near the boundary line of Mexico, Chihuahua?
A. The Cerro Prieto.
Q. Do you know a place on the river, or do you know about the time that you were there on the river, a large cottonwood on the edge of the Rio Grande—a large cottonwood tree which had been cut?
A. Yes; it was called Alamo Naranjo, or the orange-color cottonwood.
Q. Was it a large one or small one?
A. It was thick; it was large; it had some limbs.
Q. Had the bark on that tree been cut at any time?
A. No, no; the people who used to go about that place used to fire bullets at the tree, and the places where these bullets would strike lumps would form, and that is why they called it the Alamo Naranjo, or warty tree.
Q. How far was that alamo from the Cerro Prieto?
A. It is about three or four leagues.
Q. Do you know anything about a large cottonwood tree, a thick cottonwood tree, farther south than that standing right on the bank of the river Rio Grande?

A. No; I do not know that tree.

Q. Do you know what was the boundary of this tract of land on the north?

A. Yes.

Q. What was it?

A. The place called Piedras Paradas.

Q. Was that on the north or east side, Piedras Paradas?

A. On the east.

Q. How was Piedras Paradas situate with reference to the Rio Grande or the Rio Bravo?

A. On the edge of the river; that is, the river line by the side of these rocks.

Q. Well, now, going farther north from the Piedras Paradas, what was the north boundary, up the stream?

A. I do not remember.

37 Q. Do you know a hill there called Santa Teresa Hill?

A. Yes.

Q. Do you know a tree there called Alamo Naranjo?

A. Yes.

Q. How are they—the hill of Santa Teresa and Alamo Naranjo—are they situate together or apart?

A. They are apart.

Q. How far apart?

A. They may be about three miles

Q. What is the north boundary, if either one of these objects is the north boundary?

A. The sand hill, Loma de Arena.

Q. What is this Loma de Arena called?

A. It was called the Questa de Polou.

Q. Is the Loma de Arena and Santa Teresa the same thing?

A. They are the same thing; the road went over it.

Q. Where is the Alamo Naranjo from the river—the Rio Grande del Norte; how far is the Alamo Naranjo from that?

A. It is on the upper side; when the river was running at that place then it may have been one mile from the tree.

Q. How far is it from the river to the Loma de Arena?

A. It may be three miles.

Q. The Loma de Arena west of the river?

A. On the west of the river.

Q. I will ask you to state in there was in 1850, when you were there, a cottonwood—alamo—situate on the edge of the river near some sand hills with three or four bunches of palms?

A. No.

Q. What is the boundary of this property on the west towards the sunset?

A. I do not know where it is; they used to call it the road of Samoran.

Q. Do you know the place called Bordo de Arena?

A. Yes.

Q. Where is that in regard to this land?

A. I have stated that it is about three or four leagues.

38 Q. From the land or from the river?

A. I think it is from the boundary line.

Q. Do you know that the Bordo de Arena is three miles from the river?

A. Yes, from the river.

Q. Do you know a place called the Rincon de la Cobreña?

A. No.

Q. At the time you were there in 1850 was any land cultivated by Jose Maria Garcia?

A. Yes; yes, even as late as the year '54 he had his farm there.

Q. How much land had he cultivated?

A. He had a great deal of it. All the place that is called La Isla they used to plant with corn.

Q. Did he have any garden or vegetables?

A. Yes; he had them. He had his workingmen there—men that performed labor for him.

Q. Who was his mother?

A. Florinta.

Q. What relation, if any, either by blood or marriage relations, did she bear to Jose Maria Garcia?

A. She was the godchild of Jose Maria Garcia. He was her godfather.

Q. Were you well acquainted with Jose Maria Garcia?

A. Yes; I could not help but know him well.

Q. You first saw him in '50, you say?

A. Yes.

Q. When was the last time you saw him there?

A. In '54. After that I never saw him again. I know that he is dead.

Q. Had he and his family been living there, from what you heard, prior to '50, when you saw him there?

(Objected to as immaterial, irrelevant, incompetent, and leading.)

A. Yes; he had been living there before.

Q. How do you know he had been living there?

A. From the workmen themselves?

Q. Did you ever hear him say anything about it?

A. Yes.

39 Q. What did he say about how long he had been living there before '54?

(Same objections.)

A. I do not remember very well.

Q. Did he state he had been there for a long time or a short time?

(Same objections.)

A. That he was the first one to settle there; that that place had been left him by his father.

Q. Did he state whether or not his father had occupied it?

A. That it was his; yes.

Q. That he had occupied it or not?

A. Yes.

Q. Did Jose Maria Garcia have any animals or live stock at this place when you were there?

A. Yes, he had his men there; some with sheep and some with cattle.

Q. How many cattle had he?

A. He might have had two or three hundred. They were out on the prairie and could not be counted, but he had quite considerable number of cattle.

Q. He had any sheep?

A. Yes; he had goats.

Q. Did he have any sheep?

A. Also.

Q. Any horses?

A. Also. His residence was there. He transferred from El Paso to that place.

Q. Do you know under what kind of a title he claimed possession, if any, when you were there?

A. No.

Q. Do you know whether he claimed it to be a grant or public land? (Same objections.)

A. From a grant.

Q. A grant made to whom?

A. A grant from Mexico.

Q. To whom?

40 (Same objections.)

A. To his father.

Q. Where is this Cerro Prieto with reference to the boundary between New Mexico and old Mexico?

A. I think it is right on the line.

Q. Do you know how the people generally in that vicinity consider this property; that is, as to whom it belonged in '50; what was its general repute?

A. As the property of Don Jose Maria Garcia; everybody who planted there planted for him.

Q. Any people on the outside?

A. Yes.

Q. What did they say about it?

A. As the property of Don Jose Maria Garcia.

Q. Do you know about the other people on the outside who went upon that property for any purpose ever having asked permission from him to do so or anything of that kind?

(Same objections.)

A. He used to give them out on shares, or on such propositions as would be convenient.

Q. Do you know a place in the vicinity of this property called the Monteso de Ojasin?

A. No; I heard that place called Yerba de Manso; I never heard that name; that was called Yerba de Manso, and not Ojasin.

Q. At the time when you were there in '50, were there any ruins of houses there on that property?

A. Yes.

Q. At what place were they?

A. A little above Isla.

Q. Were they inside of the property or outside?

A. Within.

Q. What kind of ruins were they?
A. They were adobe walls.
Q. Ruins of houses were they?
A. They might have been the ruins of Don Antonio.
Q. Did you hear them say there to whom they belonged?
41 A. That they were ruins of Don Juan Antonio.
Q. The father of Jose Maria Garcia?
A. Yes.
Q. Was anything said about his having lived there previously?
A. Yes.
Q. Was anything said about Indians having interfered with the possession of that property while you were there?
A. Yes; that the Indians had lived there.
Q. Was anything said about Indians interfering with Don Juan Antonio or Jose Maria Garcia in the possession of the property?
A. No; I never heard anything said as to that.
Q. Did you ever hear anything said about any men being killed there?
A. Yes; the Indians were in the habit of killing people from Cerro Prieto and beyond; at that place called Yerba de Mansa they killed many men there.
Q. At Yerba de Mansa?
A. A little above the Corral de Tapia.
Q. Were they within the land or outside of it?
A. No; it is within.
Q. Do you know anything about the Corral de Trosas?
A. Yes; and the Corral de Tapia.
Q. Were they the same or different?
A. They are different places; one is here and the other is there; they are in different localities.
Q. Do you know a place near the southern boundary of this property known as the Lomas de la Ceja—near the southern boundary?
A. Yes; I know the Ceja.
Q. Where is the Ceja where the boundary line of the United States is?
A. It is on the top of the Ceja in this way.
Q. Is it on the southern boundary of this property?
A. Yes.
Q. Is the Ceja and the Cerro Prieto the same thing?
A. Yes; because the Cerro Prieto is further below.
Q. Do you mean down towards the river?
A. No; further below.
42 Q. Is the Ceja a part of the Cerro Prieto?
A. No, that is above on the upper side.
Q. That Ceja is where the boundary line is between the United States and Mexico, is it?
A. It is on the upper side.
Q. The Ceja is there where the monument is between the United States and Mexico?
A. Yes.
Q. Do you know a place there known as the Bajo de las Lomas de las Ceja?

A. Yes; where you come down from the Cerro Prieto to the bottom.
Q. Is that the Bajo de las Lomas of the Ceja?
A. Yes.
Q. And that is south of the boundary line between Mexico and the United States, is it?
(Leading.)
A. Yes.

Cross-examination by Mr. POPE:

Q. You say you live at Dona Ana?
A. Yes.
Q. Where were you born?
A. I was born in El Paso.
Q. When did you go to Dona Ana to live?
A. In '49.
Q. Your parents were living there in '49, were they?
A. No, I lived there myself alone; my parents died here.
Q. Where have you lived since '49?
A. In Dona Ana.
Q. That has been your home ever since '49, has it?
A. Yes.
Q. So the time you went down to work for Jose Maria Garcia you were living at Dona Ana?
A. Yes.
Q. And after you worked for him that month you went back to Dona Ana to live?
A. Yes; I went there and had my houses there.
Q. With the exception of that month you have lived at Dona Ana since '49?
A. Yes.
Q. You were nothing but a boy at the time you worked for
43 Jose Maria Garcia?
A. Yes; I was seventeen years old.
Q. Peoned for him?
A. Yes; I worked for him.
Q. You did not know him intimately; you just worked as a peon for him about a month; is that not true?
A. Yes.
Q. Did not have any intimate conversation with him or anything of that kind?
A. No.
Q. Did not have any business with him, except when he paid you at the end of that month?
A. Yes; that is, his foreman did.
Q. So your transactions were entirely with his foreman?
A. Yes.
Q. So you did not know him very well, did you?
A. Yes; I knew him very well; as far back as I can remember I knew him in El Paso.
Q. You knew him as the son of Juan Antonio Garcia?
A. Yes.
Q. Knew him too?

A. No.
Q. Did you ever see him?
A. No.
Q. You just knew that he was the father of Jose Maria Garcia?
A. Yes, from the workingmen themselves.
Q. Did you know that from Jose Maria Garcia himself?
A. Yes.
Q. You spoke of Jose Maria Garcia having flocks of animals?
A. Yes.
Q. I believe you said that he pastured these animals on the prairie, did he?
A. Yes; and they come down to the river.
Q. People in those days pastured animals wherever they could find pastures?
A. Yes; they had no obstacles against it.
Q. He pastured his animals off for miles from his ranch, did he not?
A. Yes.
Q. Off of this tract of land that you spoke of?
A. Yes.
Q. Wherever he could find pasture?
A. Yes.
Q. And people that had animals there pastured wherever they could find pasture too, did they?
A. Yes, they were at large.
44 Q. Both off and on this tract wherever they could find pasture?
A. Yes.
Q. All that country at that time was common pasturage?
A. Yes.
Q. You spoke of Santa Teresa hill?
A. Yes.
Q. Did I understand you to say you do know where it is?
A. Yes; or it may be different now; it is so long since I have been here; it may be the country on the other side also is different or changed, because the river changes its course every year, and I could not ten what the character of the country is now.
Q. You do not pretend to be acquainted with the character of the country now?
A. Of course not; it may be different now, because I have not been here for many years and I see the whole country is changed.
Q. And you have not been acquainted with this country since you went to live at Dona Ana, have you, when you were a boy?
A. Yes; in the year '54, when I was married, I came to this house to the ranch to get a paper for a lot that he had given to my mother, and since that time I have not been on that side.
Q. And that is the only time you have been on that side since you left and went to Dona Ana when a boy?
(Objection that he made no such statement.)
A. That was in '54, I went by myself to make a paper.
Q. Jose Maria Garcia was living there in '54?
A. Yes.
Q. You spoke of the Cerro Prieto?
A. Yes.

Q. That is, by a cerro I understand you to mean a hill that stands out by itself, do you?
A. Yes.
Q. The Cerro Prieto that you spoke of is just one hill?
A. Yes.
Q. You spoke of a ceja that was the boundary between Mexico and the United States—New Mexico?
A. Yes; it is there.
Q. I believe you said this Cerro Prieto was north of this ceja?
45 (Objection.)
(No answer.)
Q. Where is this Cerro Prieto with respect to this ceja?
A. It is here on the lower side.
Q. Is it from the ceja up the river or down the river?
A. It is down the river.
Q. Do you know where the bridge of the Southern Pacific Railroad is?
A. Yes.
Q. You know where that bridge crosses the Rio Grande?
A. Yes.
Q. How far is this Cerro Prieto from that bridge?
A. It may be a league; it is above.
Q. Above the bridge?
A. Above the hills.
Q. And where with respect to the bridge, in what direction?
A. In this direction, on the west.
Q. Is it to the northwest or to the southwest of that bridge?
A. I think it is to the south.
Q. How far is it from the railroad?
A. I do not know, because it may be about a league, because the road goes right by the Cerro Prieto.
Q. Goes by the Cerro Prieto?
A. Yes; on one side.
Q. On which side does the road pass the Cerro Prieto; are you speaking of the road to California now?
A. I am speaking now of the wagon road that they used to t'avel on at that time.
Q. Where does the railroad to California go with respect to this Cerro Prieto?
A. I think it is opposite; I do not know.
Q. The railroad to California then rund by this Cerro Prieto, does it?
A. No; it is far from it.
Q. In which direction is it from the railroad?
A. It is on this side [points to the west].
46 Q. Then you know the railroad goes west?
A. Yes.
Q. Is this on the north or the south side of the railroad going west?
A. On the south side.
Q. How far south of the railroad is it?
A. I do not know the distance.
Q. Is it as much as a league?
A. It may be a league.

Q. Your opinion is that this Cerro Prieto is a league south of the railroad?

A. Yes; I think so.

Q. So that this Cerro Prieto that you spoke of is a league inside of the Mexican line.

A. Yes, it is between the line of Mexico and the United States; the distance may be very small.

Q. Is it on the line, or below the line, or above the line?

A. On the south of the line, I think.

Q. And about how far south of the line is it?

A. I do not know; I have said I did not know how far it is; it is very many years since I have been there, and I can not state as to that.

Q. You say it was a league south of the railroad; now, how far is it south of the line?

(Objection because it misstates the fact directly and positively.)

A. I do not know the distance.

Q. Is it half a league?

A. It may be half a league; I do not know.

Q. Do you know where the boundary line is?

A. Yes.

Q. And your best judgment is that it is about a league south of that line?

(Objection that he has not stated that.)

A. Yes; it may be that.

Q. How far from the Rio Grande is the Cerro Prieto?

A. I do not know how far it is, because that is the place where the river comes together, that is the place where the bridge runs; I
47 do not know the distance to the Cerro Prieto; where the river comes together it narrows down.

Q. Do you know the east boundary of this tract of land that you have spoken of?

A. I only know the place called Alamo Naranjo.

Q. Do you state that that is the boundary on the east?

A. Yes.

Q. What did you say was the boundary on the south?

A. That place that I have just mentioned, Alamo Naranjo.

Q. That is the boundary on the south?

A. Yes.

Q. You are certain of that, are you?

A. I think so.

Q. What is the boundary of this tract of land on the north by the river?

A. Los Amoles; that is what it was called then.

Q. Where is Los Amoles?

A. That was the town that had already been called that, or the settlement.

Q. That is the boundary on the north, is it?

A. Yes; I think so.

Q. Do you know where the Bordo de Arena is?

A. Yes; it is here, west.

Q. Where is it with respect to this Los Amoles?

A. It is below.

Q. How far below?
A. I do not know how far it is; the Amoles are above, up the river.
Q. And this other is below?
A. Yes.
Q. About how far is it?
A. I do not know the distance; I can not state it.
Q. Do you know what a league is?
A. Yes.
Q. Is it one league or two leagues, or three leagues?
A. I do not know.
Q. About how much is it?
A. I do not know whether it is four leagues.
Q. Is it less than four leagues or more than four?
A. It may be more than four.
Q. Your best judgment is it is more than four leagues?
A. I can not state positively.
48 Q. How far is it from this Amoles to the Loma de Santa Teresa?
A. I do not know how many leagues.
Q. Is it as much as four leagues?
A. It may be more.
Q. Your best judgment is that it is more?
A. That it is more than four leagues.
Q. And this Los Amoles is, you say, the north boundary of this tract, as you understand it?
A. Yes.
Q. You spoke of the Piedras Paradas; do you know where that is?
A. Yes.
Q. How far is that from the Alamo Naranjo?
A. It may be two leagues.
Q. This Alamo Naranjo you spoke of is the east boundary of this tract?
A. Yes.
Q. So that this Piedras Paradas is two leagues from the east boundary?
A. Yes.
Q. How far is this Alamo Naranjo from the Rio Grande del Norte?
A. I do not know how far it is. When I knew it, it was about one league from the river. I do not know now exactly where the river is running.
Q. When you were there it was about a league from the river.
A. Yes, where the river took a turn.
Q. And that Alamo was the east boundary of this tract?
(Objection, as it is not a fair statement of what the witness said, and the language has been placed in his mouth without calling for his information.)
A. Yes, I think so.
Q. You spoke of knowing an Alamo Grueso?
A. It is the same one.
Q. That is the Alamo Naranjo?
A. Yes, that is the same one; I do not know another one; at that time I did not know another one.

Q. And that is the one you say is about a league from the river?
A. Yes, it may be; I do not know where the river runs now.
49 Q. I mean at that time?
A. Yes.
Q. When you were there in '50?
A. Yes.
Q. When you went there in '54 was that Alamo at the same place with respect to the river that it was four years before that?
A. Yes.
Q. It was at that time a league from the river?
A. Yes.
Q. Do you know some hills or lomas called Muleros?
A. Yes; it was called the Mulero Ford at White's house.
Q. What White is that?
A. An American that used to live there formerly when the Americans came to this country.
Q. Where is that with respect to the railroad bridge, this house of White's?
A. It would be about one league, I guess. I think that possibly the walls may be standing now at this time.
Q. One league in what direction from the bridge, up the river or down the river?
A. Above.
Q. So these Mulero hills are above the bridge, then, I understand you to say?
A. They are above.
Q. Do you know the Lomas Muleros?
A. No; no hills. When a man came down that slope to the hills, he came down to the ford, passed the house of White, and crossed the river there to this side.
Q. I understand you to say you do not know now any lomas called Muleros?
A. Yes.
Q. Do I understand you to say that you do not know the lomas called Muleros?
A. I know the place where you come down to the Molero Ford, where they crossed the river to California, coming down the meadow and crossed.
Q. Did they come down to a loma at that place?
A. Yes; a man who lived at one side would have to come down to the ford.
Q. Do they call these hills the Lomas Muleros?
A. Yes; the people going down the Mulero Ford.
50 Q. Do they call these hills (lomas) Muleros?
A. They call it the Mulero Ford.
Q. I mean the lomas from which they come down to that ford; what do they call these lomas?
A. They were called sand hills and muleros; people would say "I am going down to the Mulero Ford."
Q. Is this Cerro Prieto that you spoke of at the same place as this ford, or at a different place?

A. It is down from the Mulero Ford; persons would have to come down to the Mulero Ford.

Q. Is it a short distance from the Mulero Ford or a long distance?

A. It is a short distance to the Cerro Prieto.

Q. You say a short distance; now, is it as much as a hundred yards?

A. No; it is more.

Q. Is it as much as two hundred yards?

A. It may be.

Q. What is your best judgment; is it as much as three hundred yards?

A. It may be three hundred varas; it may be more or may be less.

Q. Your best judgment is, then, that it is about three hundred yards?

A. Yes.

Q. From the Cerro Prieto to this Loma Mulero?

A. No; it is more, because a person would have to come down, then turn to the ford; it must be more.

Q. It is more than three hundred yards from the Cerro Prieto to this ford?

A. Yes.

Q. Is it as much as a mile?

A. It may be a mile.

Q. You think it is about a mile?

A. Yes; because you turn around.

Q. Your best judgment is it is about a mile?

A. It may be a mile.

Q. And this Cerro Prieto that is a mile from the ford is the point you first mentioned as the south boundary of this tract, is it?

A. Yes.

Q. And this ford was about a league above the railroad bridge?

A. Yes, I think so; that is where the river narrows down.

51 Q. Do you know an arroyo called Peñasquita Arroyo?

A. No; I have not even heard the name of it.

Q. Did you mention on your direct examination a hill or cerro called Poleo Questa? Do you know where Questa de Poleo is?

A. It is the same one as the Cerro Prieto; it is the same slope as that of the Cerro Prieto.

Q. So that that is also called the Cerro Poleo, is it?

A. Yes; they are the same place, and the slope, it is called the slope of the Cerro Prieto and the slope of Poleo.

Q. And the Cerro Prieto is called the Cerro Poleo, is it?

(Objection that you have no right to deliberately misrepresent.)

A. Yes, it is called the slope of Poleo; it used to be called that before.

Q. I will ask you if it is ever called the Cerro Poleo?

A. The Cerro Prieto and the slope of El Poleo.

Q. Do you know the west boundary of this tract that you have spoken of?

A. I do not know it. I do not know where it is.

Redirect examination by Mr. CATRON:

Q. Where did you say the Piedras Paradas was?

A. They are here. It is above the river now, that is, above the Mulero Ford.

(Leading.)

Q. Ask the question again. There is no ford above the river from the Mulero Ford; is it on the edge of the river or away from the river?

A. On the edge of the river.

Q. Where is the Alamo Naranjo from the Piedras Paradas?

A. It is above the Piedras Paradas.

Q. North or south from the Piedras Paradas—the Alamo Naranjo?

A. To the north.

Q. From the Piedras Paradas, which direction does the Cerro Prieto lie?

52 A. It is to the south.

Q. Which direction from the Piedras Paradas does the Bordo de Arena lie?

A. I think it is to the south.

Q. Is it anyways towords the west also?

A. It may be, because it is on the upper side.

Q. You mean up on the side of the hills?

A. No; it is to one side from Los Paradas.

Q. How far is it from the Paradas to the Bordo de Arena?

A. Two or three leagues; it may be more; I can not state positively.

Q. Is the Bordox de Arena near the Lomas de Santa Teresa?

A. Yes.

Q. You said in your evidence that the Muleros was near White's ranch, did you not?

A. Yes; the ranch is above it, and the ford was at different places. As the river was changed people would cross it where they could.

Q. Is the ford right in front of the ranch?

A. Yes.

Q. And you say that is about a league above the railroad bridge?

A. Yes.

Q. You said also in your examination that the Cerro Prieto was about a league south or southwest of the railroad bridge, did you not?

A. Yes; I think so.

Q. Then the distance from White's ranch to the Cerro Prieto is about two leagues, is it?

A. About two leagues, I guess.

Q. If you said anything different from that you were mistaken, were you?

A. I do not think so.

Q. Which is correct, that it is about two leagues from White's ranch to the Cerro Prieto, or not?

A. It may be two or not; I do not know.

Q. Is that your best judgment?

A. Yes.

PEDRO MELENUDO, a witness of lawful age, being produced, sworn, and examined under oath on the part of the plaintiffs, testified

53 upon direct examination by Mr. Catron as follows:

Q. State your name.

A. Pedro Melenudo.

Q. What is your residence?
A. In Las Cruces.
Q. How old are you?
A. I was born in the year '10.
Q. Where have you resided all your life?
A. I was living in El Paso from 1810 to '42 or '43, and from that time I was living in Dona Ana.
Q. Where were you born?
A. In El Paso.
Q. That is Juarez?
A. Yes.
Q. Do you know the ranch called Santa Teresa?
A. Yes.
Q. Did you know Jose Marcia Garcia?
A. He was my master.
Q. Did you ever live at the ranch of Santa Teresa?
A. Yes.
Q. Who was the father of Jose Maria Garcia, if you know?
A. Don Juan Antonio Garcia.
Q. What was his mother's name?
A. Dona Josefa Dona Horcasitas.
Q. Do you know when Don Juan Antonia Garcia died, if he is dead?
A. I do not remember; I do not know.
Q. How do you know that he was the father of Jose Maria Garcia?
A. I knew it very well, because I used to work for Don Jose Maria Garcia.
Q. Did you ever hear him say anything about who was his father?
A. Yes; I knew him also. I knew Don Juan Antonio.
Q. Do you know when he died?
A. No.
Q. Do you know where he died?
A. Yes; in El Paso.
Q. State whether or not you ever worked for Jose Maria Gaacia on the Santa Teresa ranch?
A. Yes.
Q. When did you work for him?
A. I guess I worked about two years.
Q. When did you commence working?
A. Since the year '42.
Q. Did you commence in the year '42?
A. Yes.
Q. And worked through '43?
A. Yes, through '43.
54 Q. And into '44?
(Objection to this line of examination; leading.)
A. Yes.
Q. What work were you doing?
A. Herding the flocks—the cows.
Q. Where did you herd the cows?
A. At the ranch of Santa Teresa.
Q. What other animals did Jose Maria Garcia have there?
A. He also had goats and horses.

Q. How many cows did he have, or cattle?
A. He had about five hundred.
Q. You took care of these?
A. Yes.
Q. Do you know what was the boundary of this ranch on the side next to the Rio Grande?
A. Yes.
Q. What was it on the east?
A. On the east the river.
Q. What was the north boundary of the ranch?
A. The Alamo Naranjo, a thick cottonwood tree that stood at the side of the road.
Q. Was it near the river?
A. Yes.
Q. Did you notice whether or not there was any of the bark cot off of that cottonwood tree?
A. No; yes. (The witness corrected himself and said "yes" upon further explanation.)
Q. How close to the river is that tree?
A. It was very near; it was perhaps 500 yards.
Q. Do you know what was the western boundary of this property?
A. The ceja; the Ceja del Llano.
Q. How far north did this land go up the river?
A. To the north, up to the Alamo Naranjo.
Q. Is that the same tree that you have spoken about?
A. Yes; it is the same tree.
Q. Then it goes from there to where—how far?
A. To the ceja.
Q. What ceja?
A. Del Llano.
Q. What is the distance from the river to that?
55 A. It may be three leagues.
Q. What is the boundary on the south—towards Juarez?
A. On the south the cerro on which stands the pyramid of the boundary line of Mexico.
Q. Is that called a ceja, or what is it called?
A. It is called La Ceja del Llano; that is in going up to the plains.
Q. Then that ceja on the south turns towards the north, does it?
A. Yes; it is.
Q. Do you know the Cerro Prieto?
A. Yes.
Q. Where is the Cerro Prieto from this boundary monument you have spoken of—you called the pyramid, the boundary pyramid?
A. It is opposite the smelter.
Q. Is it south of the pyramid, or north of it?
A. The pyramid is to the west.
Q. Which pyramid is to the west?
A. The one that is on the mountain.
Q. The Cerro Prieto; is that north or south of that pyramid which is on the mountain; is it toward Juarez, or in the other direction?
A. The Cerro Prieto is right opposite, and on top is the pyramid.

Q. The pyramid is on top of that, is it?
A. Yes.
Q. That is called a ceja also, is it?
A. The ceja lies this way—to the south and west.
Q. Does the ceja run from the same point where the pyramid is?
A. No; it is—lies this way; it is far from it; he points to the south and to the west.
Q. Do you know a place there on the southern boundary which would be called the Lomas Cerca de la Ceja?
A. Yes.
Q. South and west of the monument is it?
A. Yes.
Q. Do you know the Unbac de las Lomas de la Ceja?
A. Yes; I know it.
Q. Where is that Unbac de las Lomas de la Ceja?
A. It lies there as you come down from what is called the Questa de Arena.
56 Q. Did you ever see any monuments of that lands of the Santa Teresa grant?
A. Yes.
Q. Did you ever see one on the south that was a monton de tierra?
A. Yes.
Q. Where was that monton de tierra placed on the south side?
A. It was on these sandy hills, these lomas de arena.
Q. How far from the monument that is on the mountain?
A. They were a little above the pyramid.
Q. Do you mean up the hill?
A. Yes; on top of the ridge.
Q. How large is that monton de tierra?
A. It was a very large mound or very large pile with rocks placed in it.
Q. Do you know who placed that there?
A. Don Jose Maria Garcia.
Q. Did you know Ventura Lopez?
A. Yes; I knew him well, Don Jose Ventura Lopez.
Q. What did Don Jose Maria Garcia place that monton there for?
(Immaterial, irrelevant, incompetent, hearsay, and leading.)
A. In order to know the place; that land of Santa Teresa his ranch is.
Q. Did Jose Maria Garcia ever plant any of the lands on that ranch?
A. It was planted for a very short while; we only planted by temporals; patches of it by temporals.
Q. What did you plant in temporals?
A. We had corn and we had also watermelons and whatever we could plant.
Q. Did you plant any wheat?
A. Yes.
Q. Vegetables?
A. Yes.
Q. Where did Jose Maria Garcia live while you were there?
A. He was there with us all the time.
Q. And any members of his family there?
A. Yes; all.

57 Q. Who were they?
A. His wife was there.
Q. Any children?
A. Yes.
Q. What were their names?
A. Dona Refugio Garcia, Juan de Tesio Garcia.
Q. Do you know anything about Juan Antonio Garcia living on the property?
A. No.
Q. Did you ever hear of his living there?
A. No.
Q. Were there any houses on the property which were claimed to be his houses and the ruins of houses?
A. Yes; there were houses and ruins of houses there, and a corral, walled corral, adobe corral.
Q. Did anybody else ever pasture their animals upon that land without the consent of Mr. Garcia?
(Leading and suggestive.)
A. Yes; there were some other men, Isidro Lara.
Q. Did he have the consent or was it without the consent of Garcia?
A. He also pastured his flocks there.
Q. By what authority?
A. He was a peon of Jose Maria Garcia.
Q. Did anybody who was not connected with him pasture their animal' there?
A. No; there was nobody there.
Q. State whether or not Jose Maria Garcia ever permitted others to pasture their animals there?
A. No; never permitted any, not even to take wood.
Q. What did he do with the other animals that came there?
A. We would drive them away from that place.
Q. What do you know about people getting wood from there?
A. They would take wood out by his written consent; they had to get consent in writing from him.

Recross-examination by Mr. POPE:

Q. I believe you said that you were a peon of Jose Maria Garcia?
A. Yes.
58 Q. In 1842, was it not?
A. Yes.
Q. And was that the first time you were his peon, in '42?
A. Yes; I was his peon since I was very young; I guess I was about 15 years old.
Q. Were you his peon while at that place in '42?
A. Yes; '42.
Q. And worked there how long?
A. I worked a year.
Q. Where did you go after that year?
A. To Dona Ana.
Q. Have you been living there ever since?
A. Yes.
Q. Constantly living there ever since?

A. Yes.
Q. How far is Dona Ana from that place?
A. I went to live in Dona Ana; that ranch is on the lower side, the upper side of Bordo de Arena.
Q. It is some 20 to 30 miles 'way, is it?
A. Yes.
Q. And you never went back to work for Jose Maria Garcia after that?
A. No.
Q. So all you know about this is what happened there in that year that you were there?
A. Yes.
Q. I believe you said you knew the father of Jose Maria Garcia?
A. Don Juan Antonio Garcia, and the wife of Don Antonio Garcia, Dona Josefa.
Q. Did you ever see him?
A. Yes.
Q. Where did you see him?
A. I used to work for him also, as I was 14 years old.
Q. Was that while you were living in El Paso or Juarez?
A. Yes; but I worked at El Bracito.
Q. And you worked for Juan Antonio Garcia, the father of Jose Maria Garcia in Bracito, did you?
A. Yes; herding animals.
Q. In what year was that?
A. In 1824.
Q. When was the last time you knew Juan Antonio Garcia?
A. When I was at the ranch of Don Antonio at Bracito, in the year '24.
59 Q. Do you know how old you were when Don Antonio Garcia died?
A. Yes; I was 14 years old.
Q. He died in 1824, you say?
A. Yes.
Q. Was that where he was living when he died?
A. Yes.
Q. How long had you been working for him at Bracito before he died?
A. I had worked about one year.
Q. Had he been living at Bracito during that year?
A. Yes; he had his animals—stock—there.
Q. And had his family there?
A. No; the family was not there.
Q. Did he have houses there?
A. Yes.
Q. Did he live in the house while you worked for him?
A. Yes.
Q. How much land did he have there at Bracito?
A. I do not know how much land he had there, but he had a quite a large tract of land.
Q. That was when he lived there with his flocks?

A. Yes; all his stock was there that he had was there.
Q. You are certain he died in '24, are you?
A. Yes.
Q. You said you knew his wife, Dona Josefa?
A. Very well.
Q. What was the last of her name?
A. Horcasitas.
Q. When did she die?
A. I can not remember.
Q. Before or after her husband died?
A. She died after.
Q. What side of the river is Bracito—east or west side of the river?
A. It is here to the north.
Q. On which side of the Rio Grande, where the sun rises, or where the sun sets?
A. To the side where the sun rises; the river is to the west.
Q. A number of other people were living there at Bracito, were they?
A. Yes; there were some.
Q. You spoke of Jose Maria Garcia pasturing his flocks there
60 in this place that you spoke of?
A. Yes; in Santa Teresa.
Q. People on those days pastured their flocks wherever they could find pasture, did they not?
A. Yes.
Q. And Jose Maria Garcia pastured his flocks out on the prairie for miles away from his ranch, did he not?
A. Yes.
Q. And other people pastured their flocks right there near his ranch, did they?
A. Yes; also.
Q. Came down to the river there to get the water for their flocks?
A. Yes.
Q. And in times of that kind you do not mean to say that they asked the consent of Jose Maria Garcia every time they pastured there, do you?
A. No; the animals were loose.
Q. And pastures were common in those days, were they not?
A. Yes.
Q. And people pastured on this tract of land that you have spoken of as Santa Teresa tract without the consent of Jose Maria Garcia, did they not?
A. Yes.
Q. And they have done it ever since you have known that tract, have they not?
A. Yes.
Q. You spoke of Jose Maria Garcia putting a monument on one of these boundary lines.
A. Yes.
Q. Was that the year when you were working for him, in the year '42?
A. Yes.
Q. You spoke of some bark of a cottonwood tree located on this tract.
A. Yes; what was called Alamo Naranjo.

Q. How far was that from the river—you said it was near the river—about how far was it from the river?

A. About 500 yards.

Q. About 500 yards from the river as it was at that time?

A. Yes; the river was turning about, turning down.

61 Q. And the lomas stood—did they not stand three or four hundred yards from the river at that place?

A. Yes.

Q. And this alamo was on the lomas, did I understand you?

A. No; it was not on the hills; it was on the level ground, and that tree was not on the hills, but it was on the open, level country, and no road passed by it, and the timber section was further away; and then the hills were still further away.

Q. The road ran between it and river?

A. Yes; near that tree.

Q. The time you speak of seeing a cotton tree, was that in the year '42, when you worked there?

A. Yes.

Q. That is the only time you remember seeing this tree that you spoke of—cottonwood?

A. Yes.

Q. And that was in '42?

A. Yes.

Q. You are certain of that, are you?

A. Yes.

Q. You were pretty well acquainted with this country here around Juarez, are you?

A. Yes; I know well all the lands.

Q. Do you know what is known as the Cerro Poleo, in the neighborhood of this town?

A. Yes.

Q. Or the Lomas de Poleo?

A. Yes.

Q. Where is that with respect to the Cerro Prieto? Where are those two places with respect to each other?

A. They are on the other side.

Q. Are they the same, or different places?

A. The cerro of the pyramid is one, and the Cerro Poleo is another.

Q. How far are they apart?

A. They are very near.

Q. Well, about how far apart?

A. About a mile.

Q. Which is the farther north, the Cerro Prieto or the Cerro del Poleo?

A. The Cerro Poleo.

Q. And that is about a mile further north than the Cerro

62 Prieto; that is, up the river?

A. Yes.

Q. Do you know what are known as the Lomas or Cerros Muleros?

A. Yes.

Q. Where are they with respect to this Cerro Prieto you spoke of?

A. They are above, up the river to the north.
Q. About how far north are they from the Cerro Prieto?
A. They may be about three miles.
Q. Which is further north, the Cerro Poleo or this Cerro de Mulero?
A. Las Lomas de Moleros; they are further up.
Q. Do you know an arroyo called the Pino, which comes out of these Muleros hills?
A. Yes.
Q. Does that arroyo go into the Rio Grande?
A. Yes.
Q. Where does that arroyo empty into the Rio Grande with respect to the Cerro Prieto you spoke of?
A. It is at Muleros, on the lower side.
Q. And how far is the mouth of that arroyo from the Cerro Prieto?
A. It may be about a mile.
Q. And in which direction is that mouth of the arroyo from the Cerro Prieto—up the river or down the river?
A. The arroyo is up the river and the Cerro Prieto down the river; the arroyo lies here and the Cerro Prieto lies in this direction, south.
Q. And that mouth of that arroyo is about a mile north of the Cerro Prieto, as I understand you to say?
A. Yes.
Q. Do you know where the bridge of the California railroad, from California, crosses the Rio Grande del Norte?
A. I do not know where it is; I have never seen it where it crosses, but I have heard it crosses at—that is called the Juarez dalls; the pyramid lies south from it and the river runs by it there.
Q. Did you see that bridge as you came on the railroad to-day?
A. No, I can not see anything; I wish I could see, but I can see very little.
63 Q. This monument you spoke of, what monument do you mean?
A. The one on top of the mountain.
Q. Do you know where the boundary line between Mexico and New Mexico is?
A. Yes.
Q. Where is this pyramid with respect to that boundary line?
A. It is on top of Cerro Prieto.
Q. Is that the monument or pyramid marking the boundary line between the United States and Mexico?
A. Yes.
Q. Where is this monument that you spoke of Jose Maria Garcia made with respect to that pyramid?
A. To the west, on top of the ceja, ridge.
Q. How far to the west is it?
A. They are far apart; this is to the west, on top of the ridge.
Q. What is to the west?
A. The monument, the mound.
Q. Which mound?
A. The monument made by Don Jose Maria Garcia.
Q. And that is where this pyramid is that you spoke of?
A. It is to the west.

Q. And you say it is far to the west?
A. It is far.
Q. About how far?
A. It may be two miles.
Q. Two miles to the west?
A. Yes.
Q. Now, do you know where the road to California runs? Have you ever seen the railroad track?
A. No.
Q. This monument of Jose Maria Garcia is up the river or down the river from this pyramid?
A. It is to the side of the plain.
Q. Is it further up the river or further down the river than this pyramid?
A. It is very little above, up the river.
Q. About how far up the river would you think it was?
A. It is, the pyramid is, just a little bit above; the pyramid lies somewhat like about east, and the mound, this monument, lies a little
64 bit north of west, inside.
Q. Which monument is it that lies a little bit inside?
A. The monument, the boundary line.
Q. You mean the monument of Jose Maria Garcia, or the pyramid?
A. That is Jose Maria Garcia.
Q. Do you know how much a mile is?
A. No.
Q. You know how much a hundred varas is?
A. Yes.
Q. This Jose Maria Garcia monument, you say, lies a little inside; now does it—is it more than or less than a hundred varas inside?
A. It may be about a hundred varas.
Q. Your judgment is it is about a hundred varas?
A. Yes.
Q. It may be more, may it not?
A. Yes.
Q. It may be as much as 500 varas, may it not?
A. Yes.
Q. That is, I understand, 500 varas north of the international boundary line?
A. It may be about a thousand varas.
Q. North of the international boundary line?
A. Yes.
Q. That is this monument that Jose Maria Garcia put there?
A. Yes.
Q. Do you know what is known as the Ancon de Muleros?
A. Yes.
Q. How long have you known that place?
A. I knew it when I was ten years old?
Q. Have you known it ever since?
A. Yes; I even ate some of the watermelons planted by the people who settled there.
Q. What people settled there?
A. There was a man Torribio Benevides.

Q. Where is that Ancon de Muleros?

A. It was right there at the place where the arroyo was coming from the hills and empties into the river, and on the right-hand side of the river they planted fields, and that was the rincon.

Q. Where is that with respect to the Ancon de Muleros with
65 respect to this monument that you spoke of; this pyramid?

A. It was to the right side; the old river was going south.

Q. Is it above? Is this Ancon de Muleros above, up the river, or down the river from this monument that you spoke of; this Government monument?

A. It was very far up the river.

Q. It is up the river, then, from this Government monument that you spoke of?

A. Yes; very far up; above three or four leagues.

Q. That was what was known, when you were a boy, as the Ancon de Muleros?

A. Yes.

Q. And that is what you have known ever since as the Ancon de Muleros?

A. Yes.

Q. Have you ever heard of any other Ancon de Muleros above the river; above El Paso?

A. No; only that place.

Q. When you were a boy, did you know where the dam of the Rio del Norte was?

A. Yes.

Q. Where was that dam located?

A. It was right opposite a house known as house, that used to be called a mill.

Q. Where is it with respect to this Ancon de Muleros that you have described?

A. It was down the river.

Q. About how far down the river—the dam?

A. It may have been two leagues.

Q. And where was it with respect to this pyramid or international monument?

A. It was on the lower side; that is, down the river.

Q. Which was down the river, the dam or the pyramid?

A. The dam.

Q. About how far was it below the pyramid?

A. The dam was further down the river; about a league.

Q. The town of El Paso was only about a league below the pyramid, is it not?

A. Yes.

66 Q. The dam was some distance up the river, was it not, from the town?

A. Yes.

Q. About how far above the town was this dam?

A. About a league.

Q. So it must have been about the place where the monument was?

A. Yes.

Q. You said it was about two leagues south of Ancon de Mulero?
A. Yes.
Q. And you said that the Ancon de Muleros was about three leagues north of the monument, did you not?
A. Yes.
Q. So this dam was about a league above the monument, or above the river from the monument or pyramid?
A. That is below, I said.
Q. It is, though, very near this pyramid, as I understand it?
A. It is about a league.
Q. Do you know where what was known as the Piedras Paradas?
A. Yes.
Q. What are the Piedras Paradas?
A. They are some rocks as big as a man.
Q. How far are they from the river?
A. They were right at the edge of the river; above the river.
Q. You said all along right close to them.
A. No.
Q. At the time when you worked for Jose Maria Garcia, in '42, where was those rocks with respect to the river?
A. They were there in the property of Jose Maria Garcia.
Q. How far was the river from those rocks?
A. The river was close to the rocks; and the river was running here, and the rocks were standing up here; the river washed the rocks.
Q. Is the river at the same place now that it was then?
A. No; I do not know if the river is there.
Q. The last time you saw the river, was it at the same place then that it is now?
A. Yes.
Q. And when was the last time you saw the river in that place?
A. In '42.
67 Q. You have not seen the river in that place since then?
A. No; I have not.
Q. You have not been to that place since '42?
A. No; I have never been at those places again. I have never traveled over those roads again.
Q. Do you know what is known as the Ancon de Bordo de Poleo?
A. Yes.
Q. Where is that with reference to this monument—international boundary?
A. That ancon is above it; Alamo Narenjo and all along that portion.
Q. And is it then—do I understand you that it is above the international pyramid or monument?
A. Yes.
Q. About how far above that is it?
A. About three leagues.
Q. Do you know what is known as the Ancon de Cobreñas?
A. No; I do not know what that is. I know all those places there, but I do not know any place by that name.
Q. You have described the location of the Ancon de Piedras Paradas?
A. Yes.

Q. Do you also know the lower Ancon de Piedras Paradas?
A. Yes.
Q. Where is that located with reference to this international monument?
A. It is on the upper side; that is, above; up the river from the pyramid.
Q. How far up the river is it from the pyramid or international monument?
A. It is right close to the hills. The bend begins right here and stretches out up the river until it comes to the Border Paradas.
Q. How far up the river is it from the international monument to that bend?
A. It may be about a mile.
Q. What did you say the north boundary of this tract was?
A. Which tract?
68 Q. This Santa Teresa track that you have been talking about?
A. The monument on top of the ridge.
Q. Is that the north boundary?
A. That is the west.
Q. On the north?
A. On the north, up the river at Alamo Naranjo.
Q. In which direction is this Alamo Naranjo from the Piedras Paradas?
Q. It is up the river to the north.
Q. Which is to the north?
A. Alamo Naranjo.
Q. About how far is it to the north of the Piedras Paradas?
A. I think a little over a league from Piedras Paradas to Alamo Naranjo.
Q. And how far did you say it was from the Piedras Paradas to the international monument?
A. It may be about two leagues.
Q. That is, the international monument is further south than that?
A. Yes.
Q. I understood you to say that you had not been to this place, Pierdas Paradas, or location since '42?
A. Since '42 I have not traveled over those roads again.
Q. When was the last time you were to that international monument that you spoke about?
A. About thirty years ago.
Q. Do you remember when the Americans came in and took possession of this country?
A. That was in '46.
Q. Have you been to where that monument that you spoke of is since '46?
A. Yes.
Q. How long after '46?
A. I think it is about twenty years after '46.
Q. Is that the last time you have seen this international monument?
A. Yes.

Redirect examination by Mr. CATRON:

Q. In response to the question by Mr. Pope, you said that other people pastured their animals on this property besides Jose Maria Garcia when you were there; what other people did that?

69 A. I do not remember who they were; their animals were loose; they would let them loose on the plains.

Q. Were these animals that belonged to Jose Maria Garcia that was given out to people on shares?

A. Yes.

Q. Did anybody who did not have animals from him pasture there without his permission?

A. No; nobo'y pastured without his permission; they did with his permission.

Q. Did everybody respect his rights there as to the control of that property?

A. Yes, we were taking care of it.

Recross examination by Mr. POPE:

Q. Did you ever hear him give anybody consent to pasture on that property?

A. Yes.

Q. Did you ever hear him refuse to give his consent to others to pasture on it?

A. Yes, even to his brothers.

Q. When you spoke of that you meant pasture there in the immediate vicinity of his ranch house, did you not?

A. Yes.

Q. Some distance away from his flocks or gardens everybody pastured, is that not true?

A. Yes; yes we pastured all the cattle and animals to the plains.

Q. And people that did not have permission from Jose Maria Garcia pastured on that tract of land which he had planted, is that not true?

A. Yes, but nobody pastured without his permission.

Q. You have seen a great many flocks that belonged to people held on shares pasturing there, have you not?

A. Yes, there were many flocks loose there.

Q. And you do not know who those flocks belonged to, do you?

A. No.

Q. And you do not know whether people who owned the flocks had gotten permission or not, do you?

A. No.

70 Q. You were out herding flocks for Mr. Garcia, and you do not know who he gave permission to, do you?

A. Yes, I herded the flocks, but I do not know to whom he did give permission to.

Q. Or whether he gave permission to people that you saw pasturing there?

A. No.

Redirect examination by Mr. CATRON:

Q. You know that he prohibited people from pasturing generally there?

(Leading.)

A. Yes; and he allowed these persons that were hunting up for animals, and we would tell him what animals they were.

Q. But he prohibited everybody from keeping animals and pasturing them there?

(Leading.)

A. Yes.

PEDRO BALIZAN, a witness of lawful age, being produced, sworn and examined on the part of the plaintiffs, testified, upon direct examination by Mr. Catron, as follows:

Q. What is your name?

A. Pedro Balizan.

Q. Where do you live?

A. In Las Cruces.

Q. Where were you born?

A. Here in El Paso.

Q. How old are you?

A. I am 89 years old.

Q. Do you know the tract of land called the Santa Teresa grant?

A. Do you mean the lands of Jose Maria Garcia?

Q. Yes.

A. Yes.

Q. Where are they situate?

A. They are there on the other side of the river from Santa Teresa north.

Q. Are they in New Mexico?

A. Yes.

Q. Do you know where the boundary line between Mexico and the United States is?

A. No.

71 Q. Have you never seen this monument up there, a short distance above here?

A. Yes, I have seen one at the bottom there.

Q. Did you see one on top of the mountain also?

A. No.

Q. You saw the one at the bottom?

A. Yes.

Q. Got an iron fence around it?

A. Yes.

Q. Are these lands of Santa Teresa above that monument or below it?

A. They are above.

Q. Near to the monument or distant from it?

A. They are far.

Q. The southern part of them is that near that monument?

(Leading.)

A. Yes.

Q. Did you know Jose Maria Garcia?

A. Yes.

Q. Were you ever at Santa Teresa grant or ranch when he was there?

A. Yes.

Q. How often?
A. I was hauling some wood from that place to town.
Q. In what year was that?
A. I would ask for written permission to haul wood down to El Paso. It was in '50.
(Motion to strike the answer out as irrelevant and incompetent and not responsive to the question.)
Q. How many times did you go there for wood?
A. I went for wood there for two years.
Q. Frequently?
A. Yes.
Q. Where would you get the wood?
A. From the property of Don Jose Maria Garcia.
Q. How far was the place above the monument where you actually got the wood?
A. I brought wood from the timber here across the river from the grove.
Q. Was that near to the Government monument or not?
72 A. It was up the river; no, it was far.
Q. Now, did you get permission from any one to get it?
(Immaterial, irrelevant, and incompetent.)
A. He gave us a written order.
Q. Who gave you an order?
(Same objection.)
A. Don Jose Maria Garcia.
Q. Where was Don Jose Maria Garcia when he gave you that order?
A. Here in El Paso.
Q. At that time was he living up there?
A. He was living in El Paso.
Q. Did he have any ranch up there?
A. Yes.
Q. Did he have any peons or employees?
A. Yes; he had.
Q. Did he have any animals?
(Leading.)
A. Yes.
Q. Did he have any cultivated lands?
(Leading and suggestive of the answer.)
A. Yes; he planted some strips of land.
Q. What animals did he have up there?
A. He had cows, he had sheep.
Q. Did he have any buildings or improvements?
A. Yes.
Q. What kind of houses did he have?
A. He had some cajales.
Q. Any corrals?
A. Yes.
Q. At what place was his houses?
A. They were here, and then they were moved to La Isla—to the island.
Q. What place do you mean by "here"?

A. At the place that used to be called Corral de Trozos.
Q. Who moved their houses from there further up?
A. From the Corral de Trozos? A. There were no other houses
72 except the house of Jose Maria Garcia.
Q. You said they were first at the Corral de Trozos and then they were moved further up. Who moved these houses from the Corral de Trozos further up?
A. Yes; they moved them to La Isla.
R. Who moved them to La Isla.
A. Don Jose Maria.
Q. What is the isla?
A. It was a grove there at the place that used to be called Alamo de la Lemon.
Q. Do you know a tree up there that used to be called the Alamo de Naranjo?
A. Yes.
Q. And where is this Alamo de Lemon from the Alamo de Naranjo?
A. It was within—in the island.
Q. Is it down the river from the Alamo de Naranjo?
A. Yes—no; it is above.
Q. Which is above? Which is further up, the Alamo de Naranjo or the Alamo de Lemon?
A. The Alamo de Lemon.
Q. How much further?
A. I can not state how far it is.
Q. Where is the Alamo de Naranjo?
A. It is out here—out to the place where the very large grove was.
Q. Is this Alamo de Naranjo a large tree or a small tree?
A. It was a large tree—very thick.
Q. When did you see it the last time?
A. When I was hauling wood; I used to pass by.
Q. Do you know where the ceja is?
A. No.
Q. Do you know where the Cerro Prieto is?
A. No.

Cross-examination by Mr. POPE:

Q. You say you live at Las Cruces now?
A. Yes.
Q. How long have you been living there?
73 A. I have lived there many years; many years in Dona Ana.
Q. When did you go there to live?
A. I went to live there in '47.
Q. And been living in Dona Ana ever since?
A. Yes.
Q. You spoke of hauling wood. You were hauling it to what place?
A. To El Paso.
Q. From this rancho that you were speaking of?
A. Yes.
Q. Speaking of cutting wood up there, did you get any up near the Alamo Lemon?
A. Yes.

Q. Did you cut any above the Alamo Lemon?
A. No; I cut from the grove inside; I cut from the time.
Q. Right there at the Alamo Lemon?
A. The Alamo Lemon was further away; I cut timber below it.
Q. Where did you cut timber with respect to the Alamo Naranjo?
A. Below the Alamo Naranjo and the timber in the grove.
Q. By below, what direction do you mean?
A. It is far from the tree; distant from the tree.
Q. Where you cut wood was it above or below the Alamo Naranjo, on the river, up the river, or down the river?
A. Down the river.
Q. How long did you cut timber over there?
A. I was hauling wood from that place for two years.
Q. You never have cut any timber there since that time, have you?
A. No.
Q. So the only time you had any acquaintance there was for two years about '50?
A. Yes.
Q. I believe you said that Jose Maria Garcia moved from below up to the vicinity or at La Isla. Is that true?
A. Yes.
Q. And I understood you to say that La Isla is there where the Alamo Lemon is?
A. Yes.
Q. And this Alamo de Lemon is above the river from the
75 Alamo Naranjo, I understood you to say?
A. Yes; it is up the river.
Q. Did you state how far up the river it is from the Alamo de Naranjo?
A. I said it was very far up.
Q. About how far up?
A. It may be, I think, two leagues.
Q. And was that where Jose Maria Garcia had his flocks at the time you were out cutting wood?
A. Yes.
Q. And that is the place which you have known him to occupy, is it?
A. Yes.
Q. At La Isla?
A. Yes.

CIUDAD DE JUAREZ, CHIHUAHUA, MEXICO,
March 29th, 1898—2.30 p. m.

GREGORIO HERRERA, a witness of lawful age, being produced, sworn, and examined on the part of the plaintiffs, testified, upon direct examination by Mr. Catron, as follows:

Q. State your name, age, and residence.
A. I was 85 years old last March, on the 12th of March; I reside here in Chamizal, in the Republic of Mexico.
Q. Where were you born?
A. Right here in this same Chamizal.
Q. Have you lived here all your life?
A. Yes; and no other place.

Q. How far is it from the church in Juarez to Chamizal?
A. Some distance—about a thousand yards, it might be.
Q. Ask him if he knew a man residing in this city of Juarez named Jose Maria Garcia?
A. Well.
Q. Who was his father?
A. Don Francisco Garcia.
Q. Who was his mother, if you know?
A. Dona Josefita Horcasitas.
Q. Was she or not the wife of Francisco Garcia?
A. Yes.
Q. Are they living or dead?
A. They are dead.
Q. How long have they been dead?
76 A. A great many years ago; it is more than thirty years.
Q. Did they have any children?
A. They did have.
Q. If you knew their children, state their names.
A. The oldest was Jose Maria Garcia—that was the oldest. The other was called Francisco Noriega y Garcia, Rafael Garcia, Pedro Garcia, Mrs. Guadalupe Garcia, the wife of Agapito Albo—he was a Spaniard; Jesus Garcia. I do not remember her husband's name.
Q. Was Jesus married?
A. Yes.
Q. Was there any other daughter?
A. No.
Q. Is Jose Maria Garcia living or dead?
A. Dead.
Q. How long has he been dead?
A. More than thirty years.
Q. Did he die before or after his father?
A. After.
Q. Francisco Noriega—is he living or dead?
A. Yes.
Q. How long has he been dead?
A. More than thirty years.
Q. Did Jose Maria Garcia leave any children? If so, who were they?
A. He left Refugio and Juan de Dios Garcia.
Q. Are they living or dead?
A. They are alive.
Q. Where do they live?
A. Here in Juarez.
Q. Francisco Noriega y Garcia—is he living or dead?
A. Yes; he is dead.
Q. Did he leave any children?
A. Yes.
Q. Who were they?
A. I can not remember their names.
Q. Do you know whether they are living or dead?
A. They are all dead.
Q. Do you know whether they left any descendants—that is, children of Francisco, if he left any children?

A. I do not remember.
Q. Pedro Garcia—is he living or dead?
A. Dead.
Q. How long has he been dead?
A. Twenty-odd years.
Q. Where did he die?
A. He died in the ward called Central, Juarez.
Q. Did he leave any children?
A. Yes.
77 Q. State their names, if you know.
A. Pedro Garcia; Jesus S. Garcia, of Albuquerque. I knew the other one, too. There was another one, but I can not remember his name.
Q. State whether or not Rafael, son of Francisco Garcia, is living or dead.
A. He is dead.
Q. How long has he been dead?
A. About eighteen years.
Q. Where did he die?
A. In Mesilla.
Q. Did he leave any children?
A. Yes.
Q. Did you know them? State their names.
A. Rafael Garcia; Felicitas Garcia, wife of Merejilda Baron. She is living here in Juarez.
Q. Any daughter of Rafael?
A. Yes; there is one over at Morencia named Guadalupe. Rafael had two sons.
Q. This Guadalupe—was she married?
A. Yes.
Q. With whom?
A. With a foreigner—with a stranger. Guadalupe was married to Agapito Albo.
Q. State whether or not Guadalupe, the daughter of Francisco de Noriega, is living or dead.
A. She is dead.
Q. Did she leave any children?
A. Yes.
Q. Give their names, if you know them.
A. They are dead.
Q. State who they were—those children of Guadalupe—if you know.
A. I know them well, but I do not remember their names.
Q. Where did they die?
A. Here in Juarez.
Q. Did they leave any children?
A. They left some. Some are dead and some are living. One of them is the wife of Martin Amador, at Las Cruces.
Q. Is Jesus, the daughter of Francisco, living or dead?
A. She is dead.
Q. Did she leave any children?
A. She had no children.

Q. State the two children of Rafael Garcia.

78 A. Sixto, and the other is Vicente.

Q. Are they living or dead?

A. They are alive.

Q. Where do they live?

A. One of them at Mesilla, and the other lives at Morencia.

Q. Which one lives at Morencia?

A. Francisco.

Q. They are the grandchildren of Francisco Garcia?

A. Yes.

Q. Do you know a tract of land situate a short distance above this town called the ranch of Santa Teresa?

A. Yes; I know it well.

Q. How long have you known it?

A. More than fifty years.

Q. When you first knew it, was there anybody living on it, or occupying it?

A. Yes; Don Francisco Garcia had it, and had horses on it.

Q. What did he say about his house?

A. He had a house and a corral.

Q. For taking care of the animals?

A. Yes.

Q. Did he have any animals there or not?

A. He had.

Q. What kind of animals?

A. Cattle.

Q. Have any sheep?

A. Yes; he also had.

Q. Have any horses?

A. Yes; he had all of them.

Q. How many employees had he there—peons?

A. Four or five; he was a rich man.

Q. Do you know the boundaries of that grant—of that tract of land?

A. Yes; I know them well, but I can not see; but I know both sides of the river is up to Robleria.

Q. On which side of the river was the ranch of Santa Teresa?

A. On this side; on the southern side, where they call the Corral de Tapia.

Q. Do you know how large this ranch was, how many leagues?

A. It was a big place, and he says that they herded out on the plains; everybody claimed out on the plains; wherever they claimed, they herded out on the plains.

79 Q. Who claimed the Santa Teresa ranch when you first knew it.

A. Nobody.

Q. Did Francisco Garcia made any claim there?

A. He was the owner; he was the one that had it and nobody made any claim by him; when they came in there they would go there and sit down on it and claim it.

Q. Who did?

A. Don Francisco Garcia.

Q. Do you know how many leagues of land Francisco Garcia claimed there?

Q. No; I do not. He says he pastured away out as far as he wanted to—out on the plains; I think that this was the Francisco Garcia, and he had his horses there.

Q. What was the claim as to whether there was a grant there or not? (Immaterial, irrelevant, incompetent, and leading.)

A. I do not know; but I believe the Spanish Government gave him a grant there; I do not know of my own knowledge that the Spanish Government gave him a grant there.

Q. Did you ever hear Francisco Garcia or anyone else say that he had a grant there?

(Same objections and suggestive.)

A. Only that time.

Q. Do you know how far up the river that grant extended?

A. I pastured up and down, but I do not know as to how far; it was claimed by Francisco Garcia, and out to the plains.

Q. Do you know the place called Piedras Paradas?

A. Well.

Q. How far was the house and corral which you have mentioned from the Piedras Paradas?

A. It was near.

Q. Within half a mile, or a thousand yards—varas?

A. Yes; about that distance.

Q. What direction was it from Piedras Paradas, that house; where was it from the Corral de Tapia?

A. It was above.

Q. Above the Piedras Paradas?

80 A. Yes; the Piedras Paradas lies south on this side, and that is higher up—the house of De Tapia.

Q. Was this house at the corral called De Tapia, or at any other place?

A. They were right up against the Corral de Tapia.

Q. How large a house had Francisco Garcia?

A. He had a small house, with very large corrals.

Q. After Francisco Garcia occupied it and after his death who occupied it?

A. Mr. Jesus Escobar.

Q. Did you know Jose Maria Garcia?

A. Well.

Q. He was a son of Francisco, was he?

A. Yes.

Q. Do you know whether he ever occupied that ranch or not?

A. I do not know whether he sold it to Escobar or mortgaged it to him.

Q. The time Francisco Garcia died, and the time that the Escobars went there to occupy it, state whether or not Jose Maria Garcia was there or not, if you know.

A. I do not remember well.

Q. Did you ever work on that ranch?

A. No.

Q. How did you happen to know the ranch?

A. When we would go up there to cut scantlings or bring wood down the river.

Q. How did you learn from that fact that it belonged to Francisco Garcia?

A. I knew it because all of El Paso knew it.

Q. Did you cut your vigas on this property—on this ranch?

A. I cut them, and the wood on these bosques were free then; then, there were no owners of these bosques up there then; they were free.

Q. Where were these bosques?

A. On both sides of the river.

Q. Do you know where Amoles is?

A. Yes; I only went up to it for timber; that means rafters and wood.

Cross-examination by Mr. POPE:

Q. You say these bosques where you cut wood were free, were they?

A. Yes; there was no owners of them.

81 Q. Everybody cut wood there, did they?

A. Everybody went there and cut them, and nobody said it was their property.

Q. Nobody claimed that property?

A. No.

Q. Which side of the river was that?

A. On both sides they cut wood.

Q. People cut on both sides, did they, of the river?

A. Yes.

Q. And nobody claimed on either side that as their property?

A. No.

Q. You spoke of these Piedras Paradas. How far was this wood cut from that Piedras Paradas?

A. A long ways up above.

Q. About how far above?

A. Two or three leagues above we cut; we went to fetch scantlings and the wood to bring to this side; and we got out wood from the other side in front of Piedras Paradas; there was a good deal of wood there.

Q. Do you get your vigas about two or three leagues above Piedras Paradas?

A. Yes.

Q. And you got your other wood nearer to Piedras Paradas?

A. Yes; on this side.

Q. Where was it you got this other wood with respect to Piedras Paradas?

A. On the other side of the river; the Piedras Paradas are on this side of the river.

Q. Did you get your wood on the other side of the river?

A. Yes.

Q. The wood was on the same side of the river that the Piedras Paradas was, too?

A. They would go and get them on this side of the river and take them back from either side of the river.

Q. People generally took from each side of the river?

A. Yes.

Q. And that was near the Piedras Paradas?

A. Yes; on this side there was wood as well as the other side.
Q. Was that above the Piedras Paradas along the river?
A. Yes.
82 Q. About how far above the Piedras Paradas was this where everybody got wood?
A. The woods was full of vigas on each side the same way.
Q. From right near the Piedras Paradas up the river?
A. Yes.
Q. Within a half mile of the Piedras Paradas, is that so?
A. The woods were full from there up.
Q. From the Piedras Paradas up?
A. Yes.
Q. And how far up did the people go from the Piedras Paradas?
A. Right near there, and that was full of wood there on the other side the same way.
Q. How far up the river from the Piedras Paradas did they get wood; all along the river?
A. Yes; the woods was full on both sides.
Q. On both sides of the river they got wood?
A. Yes.
Q. And nobody ever objected to their getting wood?
A. No; all the world could go there and get wood.
Q. About pasturage in that vicinity; did everybody pasture up there along that Piedras Paradas?
A. They pastured on both sides of the river, and they had a ranch on the other side at a place called Duras Nieto, and when the Indian raids began they had to abandon these ranches.
Q. So in that time people pastured cattle wherever they could find pasture, is that not true?
A. Yes; my father had over a hundred cattle there and asked nobody, but the Indians finished up with everything we had there.
Q. How close to the Piedras Paradas was it that your father pastured his flocks?
A. From Piedras Paradas this way and out on the plains they would come down there and drink water and nobody would say anything about it.
Q. From Piedras Paradas down this way and out towards the plains, did you say?
A. Yes.
83 Q. From Piedras Paradas up the river, too, did they pasture?
A. Yes.
Q. Everybody pastured there?
A. Yes; cattle and cows and oxen.
Q. And nobody ever objected to their pasturing in this vicinity you have described?
A. Nobody would say anything; it was a free country; everything was free there.
Q. Above and below Piedras Paradas?
A. Yes; I have a claim up there; a grant that was given to me by the Spanish Government, at Cauritillo.
Q. How far is that from Piedras Paradas?
A. I believe 15 miles.

Q. Do you know a place called La Isla?
A. Yes; well.
Q. How far is that from Piedras Paradas?
A. I know from the river here up to Robleria on both sides.
Q. How far was La Isla from where Francisco Garcia had his ranch house that you spoke of?
A. The Isla is above.
Q. How far is it above?
A. I can not give you the miles or leagues.
Q. It is as much as a league?
A. How many miles is a league?
Q. About two and a half; five thousand varas is a league.
A. I can not tell you whether it is one league or more than one.
Q. Was it as much as five thousand varas?
A. Yes; it could be.
Q. Where did Jose Maria Garcia have his ranch out there?
A. He had a ranch at Corral de Tapia.
Q. Did he have any ranch up at La Isla?
A. We herded his stock up there, above and below there.
Q. Everybody did that, did they?
A. Yes; everybody would pasture and nobody would say anything to them; both cattle and oxen and cows.
Q. In those days a man did not have to own land to pasture on it, did he?
(Not proper or competent and no foundation laid for it.)
A. Nobody; everything was free.
84 Q. You spoke of Francisco Garcia settling at that ranch, did you?
A. Yes, he went there and it was settled and said it was his.
Q. Do you remember when he went there first and said it was his?
A. It was many years ago.
Q. Do you know when it was?
A. I was not born when he took it; when I had no knowledge at all I knew he was there.
Q. When was the last time that you knew of Francisco Garcia being there?
A. More than fifty years.
Q. How old were you at the last time that you knew him to be there?
A. About 30 odd years.
Q. Are you related to Francisco Garcia?
A. By blood, no.
Q. By blood or by marriage?
A. No.
Q. Are you related to Jose Maria Garcia by his sons by blood or by marriage?
A. No.
Q. Are you related to any brothers or sisters of Jose Maria Garcia by blood or by marriage?
A. No, I am not by anything.
Q. Do you know a man named Juan Antonio Garcia?
A. Yes, he was a brother of Francisco Garcia and he had a ranch at Bracito.

Q. Did he have any children, Juan Antonio Garcia?
A. Yes, he had.
Q. Did he have a son named Jose Maria Garcia?
A. Yes, and a man named Chicos; two sons and two daughters.
Q. What was the oldest of his sons?
A. Don Maria Garcia, Chicos San Juan.
Q. Did he have a son named Jose Maria Garcia?
A. Who?
Q. Juan Antonio?
A. Yes, Maria Garcia, and the other was Chicos San Juan.
Q. I asked you if Juan Antonio Garcia had a son named Jose Maria Garcia?

A. No, not Jose Maria, but Maria.

85 Q. You have no recollection of his having a son named Jose Maria Garcia?

A. This Francisco Garcia that moved here had a Maria and Chicos San Juan, only.
Q. Are you not mistaken; was Jose Maria Garcia the son of Juan Antonio Garcia?
A. Maria Garcia, I knew him well; Maria has children, sons, and I knew them well.
Q. Do you know where the boundary line between Mexico and the United States is?
A. Yes, the line that Sever put there.
Q. The line where the monument is now with a fence around it?
A. The commissioner of Mexico was up here; I was there when Sever put it there; then a hundred yards inside of that mesquite; I went there when the line was put there; I was there myself and he built an acequia; the river knocked down pieces of his house and then he moved higher up.
Q. You know where the boundary line between Mexico and New Mexico is, do you not?
A. Yes, it is the same here, the one there.
Q. The one that is recognized now as the boundary line between Mexico and the United States?
A. It goes across there in the mountains.
Q. You know where it leaves the river, do you?
A. The river over this way, I got a big claim of lands on the other side of the river.
Q. Do you know where the bridge of the railroad going to California is?
A. Yes.
Q. Do you know the monument situated down the river from that bridge with a green fence around it?
A. No, I have not seen that with a green fence around.
Q. But you know where the bridge of the railroad going to California crosses the Rio Grande, do you?
A. Yes.

Q. Where you and the others used to go for wood and pasture
86 at the time you mentioned; where was that with respect to that bridge?

A. The California bridge runs this way, and the railroad runs this way.
Q. Where did you go with other people to get wood with respect to that bridge running to California?

A. This bridge is right here, and we used to bridge it over way up above; sometimes we would go up as high as Robleria to find rafters; all these bosques was full.

Q. Were there any bosques there at the bridge, or a little above the bridge?

A. No.

Q. How far was the nearest from that bridge?

A. There was a little wood there.

Q. Did the people get wood there?

A. Yes, there was wood right near here, but the big scantlings and rafters and things of that kind they got up from above.

Q. From that bridge up the river is it true that the people at that time got wood of any kind whatever they could find all along on the river?

(Objection that it has been answered two or three times.)

A. They went in and took their wood and nobody would object; nobody; it was free to everybody.

Q. That was from the bridge up the river?

A. Yes.

Q. They took it from the bridge up the river for many miles, is it not true?

A. Right near there on this side, and on the other side it was free also.

Q. So that on both sides of the river people got wood in those days wherever they could find it?

(Objection that it has been answered two or three times.)

A. Yes, right here in front; on the other side it was also free; McGuffin used to take it there formerly to El Paso. I have property

87 over on the other side.

Q. And when you first knew that place the people pastured all around there going up on the river?

A. Yes.

Q. They came down and brought their flocks to the river to pasture them; is that not true?

A. They would come down to the river and they would turn loose.

Q. There near the bridge of the railroad going to California in those early days when you first knew that place people brought their flocks down to the river to that place to water them, did they not?

A. If they go there now they have to pay.

Q. At the time when you were a young man, I mean.

A. They have taken all that land, and the first one that goes to pasture there they will charge him for it.

Q. Answer my question.

A. Yes.

Q. Now, my question is, at that time is it not true that everybody pastured their flocks on both sides of the river near that bridge and up the river from the bridge?

(Objection, it having been answered previously several times.)

A. Yes.

Q. And nobody objected to their pasturing in that way?

A. Nobody.

Q. And they pastured on both sides of the river for miles from that bridge; is that not true?

A. Yes; and a man could go and get wood, and nobody would say anything to him.

Redirect examination by Mr. CATRON:

Q. Is it not true, however, notwithstanding everybody pastured their animals and took wood from up there that the ranch of Santa Teresa was recognized as the property of Francisco Garcia and his children by everybody?

88 (Objection as immaterial, irrelevant, incompetent, suggestive, leading, and as having been covered by the examination in chief.)

A. Yes.

Q. Is it not also true that they recognized it as belonging to him in a grant from the Spanish Government?

(Some objections.)

A. Yes.

(The defendant moves to strike out all the testimony of the witness so far as it attempts to establish the genealogy and death of the parties to the grant, as no proper foundation has been laid.)

JESUS VELARDE, sworn on the part of the plaintiffs, testified upon direct examination by Mr. Catron, as follows:

Q. State your name, age, and residence.

A. Jesus Velarde; I am 65 years old; I live in this street that we are living on now in Juarez, and a widower and a native of this place, and laborer.

Q. Where have you lived all your life?

A. I have lived in my own ancient house and house of my fathers.

Q. Did you know Francisco Garcia many years ago?

A. Yes; Francisco Garcia y Noriega.

Q. Was he a married man; and if so, who was his wife?

A. He was married to a woman named Josefa Horcasitas and had three children that I knew.

Q. Who was his children that you knew?

A. I knew Jose Maria and Don Pedro, Don Rafael, Don Jesus, and Mrs. Jesus and Mrs. Guadalupe, the Garcias.

Q. Is Jose Maria Garcia living or dead?

A. They are all dead; only one of them living; there is only one daughter of Garcia that is alive—Jose Refugio.

89 Q. Is Juan de Dios Garcia living?

A. Yes.

Q. Whose son is he?

A. He is the son of Jose Maria.

Q. And Refugio is his sister?

A. Yes; they are brother and sister.

Q. Are they both living?

A. They are both living.

Q. How many children did Pedro have?

A. Little Pedro, one, a son-in-law of Amador's at Cruces; I do not remember these.

Q. When did Jose Maria Garcia die, if you know?
A. No; I do not know; I know he is dead, and I can not this moment recollect when he died.
Q. Has he been dead many years?
A. Yes.
Q. More than 20?
A. Yes; I can find his gravestone.
Q. Did you know Francisco Garcia in his lifetime?
A. Yes; very little; but I knew him.
Q. Is he dead?
A. Yes.
Q. How old were you when he died?
A. About ten years old; I knew him.
Q. Do you know a tract of land up the river called the Santa Teresa ranch?
A. Yes.
Q. How long have you known that tract?
A. I have known it for several years, and I understand Escobar has the ranch of Santa Teresa; I had my cattle there and little herds, and they run them out of there.
Q. Who drove them out?
A. Escobar did after Jose Maria sold to him; I had a part in that ranch; I did not buy it, it was given to me, and so as not to have any fuss about it, I just conceded it.
Q. Who gave him that piece of land?
A. The Mexican Government, and when it passed to this Government, the United States, then it got mixed up.
Q. How old were you when the Mexican Government gave it to you?
A. About 15 or 16 years; just after my father's death.
Q. When you first knew that land up there, who did it belong
90 to, or who was in possession of it?
A. I passed up there when I was about 10 years old. I do not know who claimed it then; and after about 15 years, more or less, I then asked for a piece of land there, and the Government gave me a piece.
Q. How did he give it to you?
A. I do not remember how. I have no document to it. I just had a possession there for my animals. I know only that I got wood out of there and that I had my animals there.
Q. You have no paper title?
A. No; that is the reason I made no claim to it.
Q. Do you know whether Jose Maria Garcia occupied lands there at any time?
A. Yes; he occupied it a long time.
Q. How did he occupy it?
A. I do not know.
Q. Did he have any animals?
A. Yes.
Q. Have any employees?
A. Yes; he had servants there, and he had animals there.
Q. Any houses there?
A. Yes; he had a little house there.

Q. Did he have any corrals?

A. Yes.

Q. What kind of animals did he have there?

A. He had goats and cows. He had a corral there for cows and for goats, and used to eat goats.

Q. Do you know a place up there called Ancon de Cobreñas?

A. No.

Q. Do you know a place called Piedras Paradas?

A. Yes; I know it perfectly well.

Q. Do you know a place called Corral de Tapia?

A. Yes.

Q. Where is the Corral de Tapia with reference to where Jose Maria had his house?

A. It is about a league.

Q. Which is further up the river, the Corral de Tapia or the house of Jose Maria?

A. Corral de Tapia.

Q. How far was the house of Jose Maria Garcia from the Piedras Paradas?

91 A. About a league, more or less; from Piedras Paradas is about a league up from his house; the corral was about a league to the south.

Q. Corral de Tapia?

A. From there it is about a league—was.

Q. You say you know where Piedras Paradas is?

A. Yes.

Q. Which way was the house of Jose Maria from the Piedras Paradas?

A. It was in this direction; Piedras Paradas is above; we pass to the ranch of Santa Teresa; then follow up there; then we come to the houses.

Q. From the house how do you go to the Corral de Tapia; what direction?

A. By the road.

Q. Up or down the river?

A. By taking the river up first to Piedras Paradras, and then Santa Teresa, and then comes the ranch, and then comes Borones; from Piedras Paradas to the ranch—that means the houses—and Corral de Tapia is one, and from there goes to Borones.

Q. If you know, state how it was understood generally that Jose Maria had that ranch.

(Immaterial, irrelevant, incompetent, and leading.)

A. I do not know how. He had it from the time he opened his eyes; he had it, and he was the owner from the time he opened his eyes, and claimed it and was the owner of it.

Q. Did you ever hear anybody say that he owned it by means of a grant from Mexico or Spain?

(Same objections.)

A. Ever since I opened my eyes I knew it belonged to Garcia; at least I understood it belonged to Garcia. Garcia was the owner.

Q. I asked you whether or not you had ever heard anyone say that he was the owner by means of a grant from Mexico or Spain, if you know?

(Same objections.)

92 A. I do not know; but from the time I had any knowledge at all I knew Garcia to be the owner of the grant. I do not know anything about Spain or Mexico. That grant might have come a good many years before I was born.

Recross-examination by Mr. POPE:

Q. Are you related to Francisco Garcia?

A. In no way.

Q. Are you related to his son, Jose Maria Garcia?

A. To none of them.

Q. Related to any of his brothers or sisters of Jose Maria Garcia?

A. None; to nobody of Garcia. All the relations is by Velardes and Tarravahals and Gallegoses.

Q. You said that you had a concession of a part of that ranch of the Santa Teresa from the Government?

A. It was given voluntary by Jose Maria Garcia to me, so our house could have cattle there, and then it came the question of the Americans and mixed things up. We had our animals and we went up to Santa Teresa and stayed there very often.

Q. You stated a few minutes ago that a part of that ranch was given you by the Government, did you not? Answer yes or no.

A. It was given to me by the Government; and they wanted me to become a citizen of the United States, and so everyone accepted to become a citizen of the United States and left it.

Q. Did you say a few minutes ago that when you were 15 years of age that a part of that tract was given you by the Government? Answer yes or no.

A. I said then, as I have said, we had a concession. When the question of the Americans begun they applied to us to become citizens of the United States. I came out of there. We had a portion there.

Q. From the Government?

A. Yes.

Q. From what Government?

A. From the Mexican Government.

Q. You say you had a part of this tract from the Mexican Government?

93 A. I have another place—piece—the same way from the Mexican Government; but when the American Government took possession of this property my father did not want to become a citizen of the United States and desisted from this.

Q. Don't make speeches when I ask you questions. Just answer my questions. You say there was a concession made to you by the Mexican Government, didn't you? Answer yes or no.

A. No; I have nothing there.

Q. I did not ask you what you had there now. I asked you whether you had a part there?

A. To my father.

Q. A concession was made to your father by the Mexican Government, was it?

A. Yes; to my father. When the Americans came in my father did not want to become a citizen of the United States and left it.

Q. Answer my question yes or no. Part of this ranch that you have spoken of, the Santa Teresa, was made a concession to your father by the Mexican Government, was it? Answer yes or no.

(Immaterial, irrelevant, improper, and not the best evidence.)

A. It was a piece given to my father by the Mexican Government, but he desisted against it.

Q. How old were you when this concession was given to your father by the Mexican Government?

A. Eight or ten years.

Q. Do you remember when it was given to him—do you? Answer yes or no.

A. No; I do not remember.

Q. You said you were 8 or 10 years of age?

A. Yes. I understood that they had given it to my father.

Q. When you were 8 or 10 years old you understood that this tract of land had been given to your father as a concession, did you?

A. Yes.

Q. At that time your father was pasturing there and had control of the land that he claimed as a concession, was he?

A. Yes.

94 Q. And was occupying it and claiming it, was he?

A. Yes.

Q. And he continued to occupy and claim it, did he not, until the Americans took possession of this country?

(All this testimony is objected to for the same reasons.)

A. I had my cattle there for years; then the Americans came and I had nothing more there.

Q. And you had your cattle there under this concession made to your father under the Mexican Government?

A. Yes; I had my cattle there under this concession.

Q. Where was this land that your father claimed, on which you pastured, with respect to the Piedras Paradas?

A. Right where the Piedras Paradas are, and at no other point; just the same alameda.

Q. Did you pasture under that concession up the river from the Piedras Paradas?

A. We did not go up above the Piedras Paradas; we went to Santa Teresa and we pastured out anywheres up there at Santa Teresa.

Q. On this concession to your father from the Mexican Government?

(Objection, that it is not proper cross-examination.)

A. I can not be positive; I just know that they had land there; I was very young; I could not say where it was; there is no document for the land and for that reason I can not be certain that it was mine or that it was not mine.

Q. You and your father claimed it at that time?

A. No, my father did; I was very young, and my father died in 1850, and I was about 10 or 15 years old at the time of my father's death; we had no intervention, and we have had no other documents for which we have here on the other side.

Q. Along the river at that time a great many people pastured, did they not?

A. Yes.

95 Q. People pastured all along the river on both sides from the Piedras Paradas; people pastured all the way up?

A. All that way, and always pastured up that way.

Q. And nobody ever objected to their pasturage?

A. No.

Q. It was considered as public pasturing grounds, was it?

(Objection; not proper cross-examination; no proper foundation laid for it; leading, improper, irrelevant, and immaterial.)

A. Everybody would pasture there as public ground; everybody pastured.

Q. On both sides of the river?

A. Wherever there was a crossing we would go across back and forth; when we would cross over there we would very often find all the oxes and horses there on the other side of the river.

Q. And other people pastured their oxen and horses on the other side of the river, too?

A. All El Paso pastured up there?

Q. And people got wood up there on both sides of the river?

A. Yes.

Q. From the Piedras Paradas up the river on both sides?

A. Yes; from Piedras Paradas above, wherever they wished to.

Q. For miles?

A. Yes; up to a little place called Corones.

Q. How many miles—leagues—is that above the Piedras Paradas?

A. About four or five leagues—a little more or less.

Q. Nobody made any objection to their going there to cut wood on both sides of the river from Piedras Paradas up?

A. No; not that I know of.

Q. This house of Jose Maria Garcia; which direction was it from the Piedras Paradas?

A. Right along the road; it was just below that one side of the river road going there.

Q. Which was further from the river, the Piedras Paradas or the house of Jose Maria Garcia?

A. The house of Garcia; the Piedras Paradas is down here at

96 the crossing; after one goes up here he gets to Piedras Paradas, and then from there up is the ranch of the Garcias.

Q. You said Garcia had corrals there, did he?

A. He had a corral and a little house.

Q. Your father and other people had corrals there for their cattle?

A. No; my father had alone.

Q. Other people that pastured there made corrals, did they not, for their cattle?

A. All kept up their stock in Jose Maria Garcia's corral.

Q. When they were across on the other side of the river, they made corrals, did they not?

A. No.

Q. How did they keep their flocks at night?

A. They would turn them loose and camp on the ground. There was only one corral; that belonged to Jose Maria Garcia.

Q. When was the last time you were at that place?

A. Between 25 and 30 years ago.

Q. And have not been there since?

A. No.

Q. Jose Maria Garcia lived at La Isla, did he not?

A. Yes; he lived at La Isla, and he lived at Amoles; he died there after that. A long while after he lived here and went up there we brought him from there dead. He lived at Amoles; long after he became a widower he went up there.

Q. How old were you when you went up there to live?

A. I never went there to live.

Q. When Garcia went there to live?

A. Fifty-odd years. He was a widower and again married. He was a widower, and then he was married again.

Q. That was the first time he went up there to live, was it?

A. He was a widower and married again Felipe, and from that they just left this girl, Maria—a daughter named Maria.

97 Q. A while here and a while up there?

A. Yes; after he became a widower he went up there; and when his first wife died he married again and went up there to live; his daughter is here.

Redirect examination by Mr. CATRON:

Q. You say the Government never gave your father any document or title papers for any part of that ranch?

A. No; and we have only got the verbal location there to this one on the other side—McGuffin's.

Q. Which place do you call Santa Teresa?

A. The place at Santa Teresa is where the old corrals are; but here where we had our stock together that was what we did not have any name for the place.

Q. Whose old corrals were they where you had your place called Santa Teresa?

A. I could not say whose they were. The last time I went up there I think it was in '54, it belonged to Escobar. I have not been up there since.

Q. Did you ever see any old corrals or ruins of houses up there which were said to be houses and corrals of Francisco Garcia.

(Objection that it is leading and not proper redirect examination.)

A. No. Those that I saw, houses and corrals, some were made the foundation of wood, and some of adobe made by Jose Maria Garcia.

Q. When Francisco Garcia died you was about eight years old?

A. I just barely remember, not having known him.

Q. At the time he died you had never seen this ranch then?

A. I had not seen it then; but I knew it when I went up after cattle and oxen; before that I did not know it.

SOSTENES RODRIGUEZ, sworn on the part of the plaintiffs, testified, upon direct examination by Mr. Catron, as follows:

Q. State your name, age, and official position, if you have any.

A. I am 48 years old. I am the second judicial judge.

98 Q. Where do you reside?

A. Ciudad de Juarez, Mexico.

Q. And you are the second judicial judge in Juarez?

A. District of Bravos, city of Juarez, State of Chihuahua, Mexico.

Q. As such judge have you in your possession any papers, judicial documents or papers, referring to the tract of land known as the Santa Teresa grant, and the title to the same?

A. I have them.

Q. Ask him if he will present them to Justice Stone for examination, and for the U. S. attorney for examination.

A. Yes, sir; the document is here [shows it to Mr. Justice Stone and Mr. Pope to examine the same].

Q. State whether or not the document which you have exhibited to Justice Stone and Mr. Pope, the U. S. attorney, containing five leaves and nine pages of written matter, is a part of the archives of your office, the same being contained in a book or collection of papers endorsed "1853, Protocole de Instrumentos Publicos," and under your control.

A. Yes, sir.

Q. How long has this document been in your possession?

A. From the time that he has been acting as judge, which was February, 1898, of this year.

Q. From whom and how did you receive this document?

A. By order of the Government and from his predecessor in office.

Q. State whether or not this document is an official public document belonging to the archives of your office.

A. It is; yes, sir.

Mr. POPE. No cross-examination.

SOLOMON C. SCHUTZ, sworn on the part of the plaintiffs, testified, upon direct examination by Mr. Catron, as follows:

Q. State your name, age, and residence.

A. Solomon C. Schutz; 51 years of age; residence, El Paso, Texas.

99 Q. State if you were present and heard the testimony given by Mr. Sostenes Rodriguez, second judge of the court of Juarez, given on this day.

A. I did; I was present and heard it.

Q. Did you see the document which he exhibited to Justice Stone and Mr. Pope, the U. S. attorney, in regard to the Santa Teresa grant?

A. Yes, sir; I did.

Q. I will ask you to look at the document marked Exhibit A, file 115 (being Exhibit A in this cause), and state whether or not you have ever seen that document before; and if you have, whether or not you have ever compared it with the document which Mr. Rodriguez exhibited to Justice Stone, and verified in his evidence?

A. I saw the document referred to already as Exhibit A, file 115, and on the 23rd day of November, 1878, in this city of Juarez, at that time called Paso del Norte, and while I was the U. S. commercial agent at this point, at which time I compared it with the document exhibited to Justice Stone and Mr. Pope.

Q. State whether or not you have since then made any comparison of the two documents also.

A. On this day I did again compare it.

Q. State whether or not document marked Exhibit A, file 115, is a correct copy of the original document which was exhibited by Mr. Rodriguez in his testimony to Justice Stone and Mr. Pope, the U. S. attorney.

A. I am positive it is, because I read it and have compared it with the Judge Rodriguez by reading the copy and comparing it with the original document, and also compared it at the date above mentioned, 1878, by reading it from the original document shown to Justice Stone and Mr. Pope.

Q. You can state, under your oath, that it is a correct document?

A. Yes, I can; because I made it in this same room where we are now, the same office.

100 Q. State whether or not you state positively that this is a correct copy of that document.

A. I positively do state that it is a true and correct copy of the document now in the possession of the Judge Rodriguez and custodian of the same and being the exhibit shown to Justice Stone and Mr. Pope.

Mr. POPE. No cross-examination.

SANTA FE, NEW MEXICO, *April 13th, 1898.*

I hereby certify that the above and foregoing sixty-seven (67) pages contain a full, true, and correct transcript of all the testimony taken in the above-entitled case on the dates above mentioned.

W. J. MCPHERSON,
Official Stenographer.

101 The United States Court of Private Land Claims, at Santa Fe, New Mexico, June term, 1898.

M. R. PENDELL ET AL. *vs.* THE UNITED STATES. } No. 168. Santa Teresa grant.

Depositions taken in the above-entitled case in the Federal Building, Santa Fe, New Mexico, July 6th, 1898, before Honorable Joseph R. Reed, Chief Justice.

Appearances: Mr. T. B. Catron for the claimants; Mr. William H. Pope, assistant United States attorney for the Government.

SAMUEL B. BEAN, sworn on the part of the claimants, testified upon direct examination by Mr. Catron as follows:

Q. State your name, age, and residence.

A. My name is Samuel B. Bean; I am seventy-nine years of age; my residence is Las Cruces, New Mexico.

Q. Are you acquainted with the location of the present city of Juarez in Mexico?

A. I am.

Q. How long have you known it?

A. Since 1846.

Q. By what name was it known at that time?

A. It was known as El Paso del Norte.

Q. Since, its name has been given to Juarez?

A. Yes; that is its late name.

Q. In what manner did you happen to get acquainted with El Paso del Norte in 1846?

A. I arrived there in Colonel Doniphan's regiment, or Missouri volunteers, during the Mexican war.

Q. Were you a soldier in that regiment?

A. Yes, sir.

Q. How long did you remain in El Paso del Norte at that time?

A. We were there a couple of months, more or less.

Q. On which bank of the river is El Paso del Norte, the east or the west bank?

A. It is on the west or right bank.

Q. Did you know a man at that time at El Paso by the name of Jose Maria Garcia?

A. I did not know him at that time, but I got acquainted with
102 him afterwards.

Q. Where were you quartered at El Paso del Norte when you were there with Doniphan's regiment?

A. We were quartered in the house that I learned afterwards belonged to him, this Jose Maria Garcia. I became acquainted with him afterwards.

Q. Were any of the soldiers or troops quartered in the building at El Paso where the public papers and archives were kept?

A. We were quartered in the room adjoining the room where the archives were kept, and the door was unlocked—open.

Q. State in what manner, if any, these papers were used by the American troops when they were there, or what was done to them, if anything.

A. The boys used to destroy them outrageously, and used to take them and tear the ledger leaves out of the ledgers when they wanted to go to the privy.

Q. What about the loose papers? How did they use them?

A. The same way. There were a great many of them loose papers. The shelves were all full of loose papers.

Q. When you speak of papers, what do you mean?

A. A book, a ledger, very large record books, such as we use.

Q. Did you ever see any papers that were sewed together in packages there also?

A. Numbers.

Q. How did they treat them?

A. They used to tear them to pieces; the more damage they could do to them the better. At the house of Jose Maria Garcia, we afterwards learned, we were quartered.

Q. State whether or not any papers were destroyed at that house by the soldiers at that time in the house of Jose Maria Garcia.

A. The quarters, I understood, belonged to him, where we were quartered.

Q. The house where you were quartered was his house?

A. Yes, sir; I talked to him afterwards.

(Mr. Pope objects to anything he said as immaterial, irrelevant, incompetent, and hearsay.)

Q. About how soon after the war was it that you had that conversation with him?

A. He lived in Amoles, Doña Ana County, when I was sheriff.

Q. When was that; what year was you sheriff?

103 A. It was in the year '54, '55, '56, up to '60, I was sheriff.

Q. What can you state about any large numbers of archives that were in that building being destroyed?

A. There was tables and seats in there, and, as the door was open—the side door, where we were quartered—we went in there to do our writing, and I saw a great many papers destroyed.

Q. A great many were destroyed?

A. Yes, sir.

Q. Were these private papers or public archives?

(Mr. Pope objects to the question on the ground that it is immaterial, irrelevant, incompetent, and no proper foundation had been laid for it.)

A. I understood them to be public records.

Q. And archives?

A. Yes; they had that appearance.

Q. How long since you were at El Paso the last time, or Juarez?

A. Four or five years ago.

Q. Do you know where the public buildings are now where the archives are kept?

A. No; I do not believe I do.

Q. Do you know where the soldiers' quarters are?

A. Yes; I believe I do.

Q. It is up there back of the churches?

A. Yes; there the same place now.

Q. Where was the place where these were kept at El Paso at that time?

A. It was on a street running out from the plaza and not very far from the plaza; that was where we were quartered.

Q. Do you know what was up there on the hill at that time, back of the church? Did they belong to the Government or private?

A. I think the calaboose was there, up in that locality some place.

Cross-examination by Mr. POPE:

Q. You say El Paso del Norte, the present town of Juarez, is on the west side of the Rio Grande?

A. Yes, sir.

Q. Do you know where the present international boundary line is?

A. Yes; the boundary line is up at that monument.

Q. You know where the monument is?

A. Yes.

Q. How far is the town of El Paso del Norte below that monument?

A. About a mile and a half.

104 Q. In a straight line run from the monument?

A. In a straight line, about a mile and a half. This would be to the first houses up the river at the town.

Q. How far are the first houses of the town from the church?

A. What church do you mean?

Q. I mean the church in Juarez.

A. The church from there, towards the north, they are about half a mile, maybe more.

Q. How far, then, do you think it would be from the church to the monument on the international boundary line north?

A. Perhaps about two miles.

Q. Did Jose Maria Garcia live—was his residence at the place where these soldiers were quartered?

A. I do not know where his residence was at that time. He had several places. He resided up in Doña Ana County. After that he resided in Doña Ana County, in Amoles.

Q. I mean in the town of El Paso del Norte. Where was his residence in 1846; was his residence in this house where the soldiers were quartered?

A. I do not know about his residence, only what I learned from him in conversation afterwards. When he lived up in Doña Ana County, where I lived, then he had conversations about the war, and about the soldiers in El Paso and what damages they had done him, and he found out I was one of them.

Q. What was your information, whether he lived in El Paso in the same house where the soldiers were quartered in or in a different house at that time?

A. I do not know.

Q. You do not know whether he lived in El Paso at that time?

A. No, sir.

Q. How many rooms were there in this house?

A. I do not know; there were several rooms; there was rooms for a number of troops. I was not acquainted with him at that time. I became acquainted with him afterwards.

VICENTE GARCIA, sworn on the part of the claimants, testified upon direct examination by Mr. Catron as follows:

Q. State your name, age, and residence.

A. My name is Vicente Garcia; I am going on to sixty-one
105 years old; I live in La Union; it is in New Mexico and Doña Ana County.

Q. How far is La Union from the city of Juarez, in Mexico?

A. It may be seven or eight leagues.

Q. In what direction do you go from the city of Juarez to go to La Union?

A. It is northwest.

Q. It is up the Rio Grande from Juarez?

A. Yes, sir.

Q. It is situated close to the river?

A. Yes, sir; very near.

Q. Where were you born?

A. In Juarez.

Q. When did you move to New Mexico?

A. I moved in 1853 from El Paso, and from there came to Mesilla, with my father.

Q. Do you mean the present city of Juarez?

A. Yes, sir.

Q. Were you acquainted with Jose Maria Garcia?

A. Yes, sir; he was my uncle. He was the grandfather of Mr. Francisco Garcia.

Q. Are you acquainted with the tract of land known as the Santa Teresa grant, situated somewhere north or northwest of the city of Juarez?

A. Yes, sir.

Q. When did you first get any knowledge of that tract of land?

A. I knew it personally when I crossed from that place in 1853, going up. I had known of it before from conversation with my father.

Q. Who was your father?

A. Rafael Garcia.

Q. A son of Francisco Garcia?

A. Yes, sir.

Q. He was also a brother of Jose Maria Garcia?

A. Yes, sir.

Q. You say your father told you about it before 1853?

A. Yes, sir.

Q. Is your father living or dead?

A. He is dead.

Q. How long has he been dead?

A. He died about ten or twelve years ago.

Q. Is Jose Maria Garcia living or dead?

A. He is dead.

Q. Is Fransisco Garcia, your grandfather, living or dead?

A. Dead. I did not know him personally.

Q. Are any children of Francisco Garcia living?

A. There are none living.

Q. What did your father tell you about the grant, when he first told you about it?

(Mr. Pope objects to the question because it is immaterial, irrelevant, and incompetent.)

106 A. He told me that he had that grant at the Corral de Tapia, and he also showed me a boundary of it.

Q. What boundary did he show you?

A. The one on the opposite side, on the west and north.

Q. The northwest corner?

A. Yes, sir.

Q. Did he show you an object, or what did he show you?

A. It was a sort of a monument, made out of stone and mortar; made out of sandstone.

Q. How large was it when he showed it to you?

A. It was quite high—about a foot and a half.

Q. What kind of rock was it?

A. Small rocks; kind of square stones that seems to be in that country. Sandstone is to be seen in that country.

Q. When did you last see that monument?

A. About two years ago; and I saw it very frequently.

Q. Have you seen it the last couple of months or more?

A. Yes, sir. I also saw it always when we go out to take out the animals. I have seen it lately.

Q. What is its condition now with regard to its condition when you first saw it?

A. A great deal of it has been worn out by the rain, and it is very small now.

Q. Is that rock soft rock or hard rock?

A. It is soft.

Q. How far, when you first saw it, was it from the Rio Grande?

A. I think it was five or six miles.

Q. Do you know the place called Ancon de Cobreña?

A. That boundary is at that place.

Q. What direction is that stone monument from the Ancon de Cobreña?

A. It is toward the hills on the west.

Q. Is the river at that place now running at the same place when you first saw that stone?

A. No, sir. The river now runs right close to the hills.

Q. On which side is it now with reference to where it was when you first saw that monument—east or west of the place where it was then?

107 A. It is to the west; almost all of the river is to the west; and the course of the river is right by the foot of the hills, with very few exceptions.

Q. When you first knew that place, how close was it to the foot of the hills; how far was it from where it runs now?

A. There were portions of it that were about six miles, some seven miles, and some four, perhaps.

Q. Further east than it is now?

A. Yes, sir; it was very far to the east.

Q. How did the river go across to the place where it is now; did it gradually wear off all the land, or did it break through and leave a portion of the land on the other side?

A. In portions of it the river gradually began to eat away the land, and at other portions it jumped over and left small places.

Q. Is there any portion of that land which was on the west side of the river at that time now on the east side?

A. Yes, sir.

Q. Was that land cultivated land formerly that is on the east side of the river that was formerly on the west side?

A. No.

Q. What was the boundary of the grant on the north, as you understood it at that time, of the Santa Teresa grant, when you first knew it?

A. It is the monument right at the place called Cobreña.

Q. What is Cobreña that you mentioned?

A. It is a sort of a point there which has some rocks, and we used to call it La Cobreña.

Q. Are those rocks there now?

A. They are almost all obliterated.

Q. Do you know anything about that time, a cottonwood tree up there, which was marked as one of the boundaries of the grant, situated somewhere near the edge of the river?

(Mr. Pope objects to the question because it is leading and suggestive.)

A. Yes, sir.

Q. Did you ever see that tree?

A. Yes, sir. That tree had a mound of stone and sand around it.

Q. Was it in the bottom of the river or up on the hills?
A. It was in the bottom lands.
Q. Is that tree there yet?
A. It is not there.
Q. What has become of it?
A. I do not know whether it was cut down, or whether it died, or what became of it.
108 Q. Did the river have anything to do with it?
A. No, sir.
Q. Can you go to the place now where that tree was?
A. Yes, sir.
Q. How long since you saw the place where that tree was?
A. About twenty years or eighteen.
Q. Was that tree in the Ancon de Cobreña, or where was it?
A. It is a little above, in the timber.
Q. Do you know where the Piedras Paradas are?
A. Yes, sir.
Q. Do you know where the place called Ancon de Muleros is?
A. Yes, sir.
Q. Do you know an Ancon Lina below on the river, below Piedras?
A. Yes, sir.
Q. What is that Ancon called?
A. That is called Ancon de Muleros.
Q. That Ancon de Muleros is down the river from Piedras Paradas?
A. Yes, sir; it is below.
Q. Do you know the bridge of the California railroad; that is, the Southern Pacific Railroad?
A. Yes, sir.
Q. How far is that Ancon de Muleros from the bridge of the railroad across the river there?
A. It may be five hundred yards, more or less.
Q. Do you know the national monument that divides Mexico from the United States, situated on the river there?
A. Yes, sir.
Q. How far is that from the railroad bridge?
A. About four hundred yards, more or less.
Q. Which direction?
A. The monument is below.
Q. South?
A. Yes, sir.
Q. Did you know of any cottonwood tree that stood there, at the Ancon de Muleros, below the Piedras Paladas, that was known as the boundary monument of the Santa Teresa grant?
A. Yes, sir.
Q. Where was that cottonwood tree situated with reference to the Ancon de Muleros?
A. It was a little below Piedras Paradas.
Q. Do you know the Corral de Muleros?
A. Yes, sir.
Q. How close to the cottonwood tree is the corral—close to it or far?
A. It was far.

Q. How far?
A. It may have been, more or less, a mile.
Q. Above or below?
A. Below. It was above Muleros.
Q. Was it below the Piedras Paradas?
A. Yes, sir.
109 Q. How far was it on the river below Piedras Paradas?
A. About two hundred yards, perhaps less.
Q. What was the condition of that cottonwood tree when you saw it?
A. It was not very thick yet.
Q. Was it marked in any way?
A. I did not notice it.
Q. Did you notice whether the bark had been taken off of it, in any part of it?
A. No; I did not. I seen it many times when I passed by, but I never noticed it particular.
Q. What was the boundary of the Santa Teresa grant on the south, so far as you knew it at that time?
A. I do not know about that.
Q. Were you told by any persons what was the boundary at any point?
A. My father used to tell me that the lines used to run there across towards the hills, but never showed me where. This other one he showed me.
Q. Where was this southern boundary of the Santa Teresa grant, with reference to the boundary line between Mexico and the United States?
(Mr. Pope objects to the question on the ground that the witness has already stated that he did not know, and it is leading.)
A. I never knew. I do not know.
Q. Did you ever know about where the southwestern corner of the grant was?
A. No; I did not know the others; I only knew this one.
Q. Who, if you know, occupied or managed or controlled that grant, when you first knew it?
A. It was the property of Don Jose Maria Garcia.
Q. Did your father have any interest in it at that time?
A. Yes, sir.
Q. How did he use it when you knew it first in 1853?
A. They always had stock there while the Indians did not drive them away.
Q. Did they have any houses or corrals there?
A. Yes, sir.
Q. What did they have in the shape of houses and corrals?
A. They were adobe houses and adobe corrals.
Q. Do you know whether they cultivated any lands there or not?
A. No, sir; I do not know; I do not think they did. The river was very bad at that bend. It overflowed badly at that bend.
Q. Did any other people ever use or occupy any portion of
110 that land, besides your father and Jose Maria Garcia?
A. Also Mr. Sebastian Bermudas.

Q. Was he any relation of yours?

A. No, he was not; but he was a great friend of Don Jose Maria Garcia.

Q. By what right or permission did he happen to be there?

A. By the permission of Don Jose Maria Garcia.

Q. Was ever any timber or anything else taken from that land for use in El Paso?

A. Very seldom; they took some wood from there. The most of the timber which was taken out there was taken for the dam?

Q. What dam?

A. The El Paso dam at that time.

Q. Where was the El Paso dam?

A. Near the site of Juarez.

Q. How far was it from the Ancon de Morelos?

A. About a league and a half; about two leagues, more or less.

Q. How far was the dam from the Piedras Paradas at that time?

A. I think over two leagues.

Q. How far was the dam below the present monument dividing the two countries?

A. The dam, as it was at that time, I think less than a league; about two miles.

Q. Are you very well aquainted with the length of the league?

A. Not very well. It may be about two thousand yards, more or less.

Q. That is your idea of a league, is it?

A. I did not say that that was a league. I mean that that distance may be two thousand yards. It is not very far.

Q. Is that Juarez dam at the same place now that it was in '53, or further up?

A. It is at the same place.

Q. You think that dam is about two thousand yards below the monument?

A. Yes, sir; more or less.

Q. You think it is about four thousand yards from the monument up to the railroad bridge?

A. Yes, sir.

Q. And about five thousand yards from the railroad bridge up to the Ancon de Mureros?

A. Yes, sir.

111 Cross-examination by Mr. POPE:

Q. You live at La Union?

A. Yes, sir.

Q. That is on the Refugio grant, is it not?

A. Yes, sir; it is in the Refugio grant.

Q. Is that the same place as Chamberino?

A. It is the same place.

Q. Do you know a place near there called La Isla?

A. Yes, sir; I live right at the place called La Isla.

Q. That is the same place where Jose Maria Garcia used to live?

A. Yes, sir.

Q. Jose Maria Garcia had an interest in the Refugio grant, did he not?

A. Yes, sir.

Q. His lands were further south on that grant, were they not?
A. They were between the west and the south.
Q. And they were at that place called La Isla?
A. Yes, sir.
Q. La Isla is in the Refugio grant, then, is it not?
A. Yes, sir.
Q. This monument that you spoke of—of stone—when did you first see that?
A. About twenty years ago. I think it was about twenty years. It is more than twenty years that I saw it.
Q. That is your best judgment that it is about twenty years since you first saw it?
A. I think it is more than twenty years.
Q. You remember about the time the survey was made of this tract?
A. No, I do not know. I heard that they were going to make a survey, but I do not know whether they were going to make a survey or not.
Q. That was about the time you saw this monument first?
A. I had already seen it.
Q. How long before that had you already seen it?
A. I do not remember.
Q. As much as a year?
A. I think more.
Q. As much as five years?
A. Two or three years, I think.
Q. That monument is not as well marked now as it used to be then?
A. A person that knows that place where it is can go right straight to it.
Q. These cottonwoods that you spoke of, when you did you first see them?
A. That tree there at La Cobreña the opposite one I saw in '53. It was by the side of the road.

112 Q. The Ancon de Cobreña, is that right on the river?
A. Yes, sir.
Q. How far is the Plaza of La Union from the Rio Grande?
A. I think it is not over four hundred yards.
Q. How far is this Ancon de Cobreña from the Plaza of La Union?
A. It may be about a league; it may be more.
Q. Do you know how many miles there are in a league?
A. I do not know. I know that five thousand varas is a league.
Q. You say this monument was how far from the Rio Grande? I believe you said it was five or six miles?
A. Yes, sir.
Q. At that time a little over two leagues?
A. It may be less. I do not know. I do not know the distance. It may be five or six miles.
Q. Is that from the Rio Grande as it runs now?
A. That is the distance from where the river runs now.
Q. It ran then at the same place where it runs now?
A. It does not. Now it runs very close to the hill, but then it used to run right far out in the bend.
Q. This monument is four or five miles from where the river runs now, or where it used to run, from where it ran then?

A. No; it may be a mile or less from the river.

Q. When did this river change?

A. It has been changing gradually. I do not remember. At least since fifty-nine. Since I came there it has been changing gradually.

Q. When you went there in '59, had it changed from where it was in '53?

A. From that time to this the river has changed a great deal to the west.

Q. You said it is down where this international monument is, did you?

A. Yes, sir.

Q. Do you know any monument that is down there in the valley of the river with a fence around it?

A. Yes, sir.

Q. Is that monument above or below the railroad bridge, going to California?

A. It is below the bridge.

Q. These Piedras Paradas, where are they with respect to the river?

A. They are towards the west.

Q. How far from the river?

A. The river is very near; it may be a hundred yards from it.

113 Q. Are they up the river or down the river from this international monument?

A. They are above.

Q. About how far above?

A. I think it is about a league, more or less.

Q. These Piedras Paradas are about a league, more or less, up the river by the international boundary monument?

A. Yes, sir.

Q. Have you been down to that part of the country lately?

A. I have not been there lately, but I suppose these rocks have always been there. There are some high rocks in the surrounding country, right around.

Q. Have you been there since that brick factory has been erected down there?

A. What brick factory?

Q. The one near the international monument.

A. I have not been there since.

Q. This Ancon de Muleros, is that up the river or down the river from this Piedras Paradas?

A. It is below. The Ancon de Muleros adjoins with the hills.

Q. How far is that from the river?

A. What?

Q. The Ancon.

A. At the place where it turns around towards the settlements, towards the Placitas, it is right close to the river.

Q. About how far is this Ancon down the river from Piedras Paradas?

A. The Ancon de Muleros starts below the Piedras Paradas.

Q. How far—near or far?

A. It may be a mile, more or less. It may be less.

Q. That is, to the actual Ancon de Muleros itself?

A. Yes, sir.

Q. It may be five hundred yards?

A. I can not state the distance.

Q. Is this Ancon de Muleros about a mile or more by the river from the international boundary?

A. Yes, sir.

Q. This El Paso dam, is that above or below the international boundary?

A. Below.

Q. About how far below do you think it is?

A. I do not think it is two thousand yards; it may be less; or it may be two thousand yards, more or less.

Q. This Alamo that you spoke of, how far is that below the Piedras Paradas?

A. It may be a hundred or two hundred varas.

114 JESUS ENRIQUEZ, sworn on the part of the claimants, testified upon direct examination by Mr. Catron as follows:

Q. State your name, age, and residence.

A. My name is Jesus Enriquez; I am a little over fifty-four years old; I live in the county of Doña Ana, in the colony of Refugio, Amoles; I was born in Mexico, in Juarez; at the present place where I was born is Juarez; it was El Paso then.

Q. Is that north, east, or west of the Rio Grande?

A. It is to the south.

Q. Does the river run from southeast to northwest there?

A. It runs to the east.

Q. Are you acquainted with a tract of land known as the Santa Teresa grant?

A. Yes, sir.

Q. How long have you known that tract of land?

A. Since '52. I was very little when I went to that colony.

Q. You know where the northern boundary of that grant is?

A. Yes, sir.

Q. Where is it?

A. It is at La Cobreña.

Q. Did you ever see that monument on the north boundary anywhere?

A. Yes, sir.

Q. Where is it?

A. It is on the slope of the hills, about a thousand yards from the place where river now runs.

Q. How long have you known that to be one of the boundaries of that grant?

A. I knew it from my father, who was brought up at that place; he was working at that place.

Q. Who was he working for?

A. Sometimes he worked for Jose Maria Garcia; at other times for Francisco Garcia de Noriega.

Q. On the Santa Teresa grant?

A. Yes, sir.

Q. Where were you when your father to. you about that monument being one of the boundaries?

A. When we moved over to that colony.
Q. About how old were you?
A. I was about fourteen or twelve years old.
Q. Did you ever know of a cottonwood tree also on the north boundary, down near where the river formerly ran?
A. Yes, sir.
Q. Did you ever see that tree?
A. Yes, sir.
Q. When you were very young?
A. Yes, sir.
Q. Is that tree there now?
A. No, sir.
115 Q. What has become of it?
A. The river has carried it away, because the river has been eating up the ground there.
Q. Where is that tree situate in regard to the Ancon de Cobreña?
A. It is far.
Q. Was there another tree farther north from that?
A. There was one where there was a boundary line.
Q. How close was it to the river?
A. It was three or four hundred yards at that time from the river.
Q. Was it at the Rincon de Cobreña or some other place?
Q. It was at the Rincon de Cobreña.
Q. Did that tree have any mark on it that you remember?
A. Yes, sir; it had a cross and had some stones around it.
Q. How do you know that it was a boundary tree?
A. From Jose Maria Garcia and from my father.
Q. What did the people in that vicinity say about that monument and that tree being a boundary, if anything?
(Mr. Pope objects to the question because it is leading.)
A. That it was the boundary line that had been established by Father Ortiz, and from that place there was the grant of Jose Maria Garcia.
Q. Which way was the grant of Jose Maria Garcia from that monument?
A. To the south.
Q. Do you know a place on the river called Ancon de Muleros?
A. Yes, sir.
Q. Do you know a place called Piedras Paradas?
A. Yes, sir.
Q. What direction is the Ancon de Muleros from the Piedras Paradas?
A. It is towards the south.
Q. Are you acquainted with the boundaries of the Santa Teresa grant?
A. I know only that one.
Q. Which one?
A. That one on the north side.
Q. Does the Rio Grande run now along by that grant at the same place where it ran when you first knew it?
A. It does not.
Q. Which way is it from its original course when you first knew it, west or east?
A. To the west.

Q. I will ask you to look at this plat (marked Plaintiffs'
116 Ex. 16) which I show you, and state if you recognize the location of the objects on that.

A. I do.

Q. There is marked on that map the Rio Nuevo. Is that where the river formerly ran, or is it where the river runs now?

A. It is where it runs now, the top of the map is towards the north.

Q. This tree marked on the north there, alamo; that you know is the boundary, is it?

A. The alamo, cottonwood tree, that has the stones around it.

Q. Where is the monument?

A. This, this one. [Pointing to the place near Cobreña.] This monument is made out of sandstone. [Marked in pencil Monument NW.]

Q. What does this that is marked on the map Rio Biejo—what does that designate?

A. That is the old river.

Q. Is that where the river ran when you first knew it?

A. Yes, sir. At this place where the river empties into the old river from the new bed it is not well marked there, and comes into the river together in several branches.

Q. Are you acquainted with a monument down there that is known as the boundary monument between the two nations?

A. Yes, sir.

Q. State whether or not there is a place at that point that is called the narrow channel in the river?

A. It is there.

Q. Is that place near that monument?

A. Yes, sir.

Q. Is it above or below the monument?

A. It is above. It is north of the monument.

Q. The place is where the railroad bridge crosses?

A. Yes, sir.

Q. How far is it from the international monument up to the railroad bridge?

A. I think five hundred yards, more or less.

Q. Are you acquainted with the place called Ancon de Cobreña?

A. Yes.

Q. Are you acquainted with the place called Piedras Paradas?

A. Yes, sir.

Q. Look at this place called Piedras Paradas, and state whether or not it is correctly located on there.

A. Yes, sir; it is.

Q. Now, point on the map where the Ancon de Muleros is?

A. From that place below.

Q. Where is the principal ancon? Where is the bend?

A. It is right here. This valley here is very large.

117 Q. Where is the point on the river that is marked Bado de Muleros?

A. It is a ford that used to be up above this railroad.

Q. Where is the principal bend that makes the ancon on the river with reference to the Bado de Muleros?

A. It is right here; that place marked X. It is about five hundred yards, called Piedras Paradas.

Q. The ancon is about five hundred yards below the Piedras Paradas?

A. Yes, sir.

Q. Did you ever know of a tree down on the southern boundary line of that grant?

(Mr. Pope objects to the question, on the ground that he has already stated that he did not know any other boundary except that one.)

A. I do not know; I never knew.

Q. From the Piedras Paradas, how far is it from the Bado de Muleros?

A. It may be two miles.

Q. Is the Bado de Muleros in front of the Rincon de Muleros, or below it or above it?

A. It is at the corner of the Muleros.

Q. What is the land there called after the Ancon de Muleros?

A. It is the Ancon de Muleros.

Q. What does the word ancon mean?

A. It is a sort of a bend; it is a little valley.

Q. It is a bend in the river, is it?

A. Yes, sir.

Q. Ancon, then, means where the river makes a bend?

A. Yes, sir.

Q. Where was the Ancon de Muleros when the old river ran where it is here, and this new river had not been formed?

A. This is where the river used to run before; this is the shape of the river as it was before—several branches—and the Ancon de Muleros, the river was coming around like a snake, zigzag, and the Ancon de Muleros was right here, marked M.

Q. Is this bend you have here known as Ancon de Muleros?

A. Yes, sir; marked M. A.

Q. That whole bend on the other side of the river, then, that was on the other side of the old bed of the river, was it?

A. Yes, sir.

Q. It was the bend that was formed there just before it went into that place, was it?

A. Yes, sir.

Q. When you first knew that property, the Santa Teresa grant,
118 who used and exercised control over it?

A. Don Jose Maria Garcia.

Q. Who was recognized by the people, if anyone, as being the owners or proprietors of it in that vicinity?

A. Don Jose Maria Garcia.

Q. How did the people regard the property, or respect it as belonging to anyone?

A. At first, as the property of his father; my father used to tell me it was his property; and others would respect it as Jose Maria Garcia's property.

Q. Are there any ruins on that property?

A. Yes, sir.

Q. Any old houses or corrals?

A. Yes, sir.

Q. Where are they situated on the property?
A. They are at the Corral de Tapia.
Q. How far are they from Piedras Paradas?
A. A mile and a half.
Q. About what direction?
A. To the south of Piedras Paradas.

Cross-examination by Mr. POPE:

Q. You live at what place?
A. At the present time, Anthony, New Mexico.
Q. That is now over in Texas, is it not?
A. No, sir. I live at the place that is called Colony Refugio grant.
Q. You live on that grant?
A. Yes, sir.
Q. This Rincon de Cobrenas, where is that, with respect to the Refugio grant?
A. To the south.
Q. Do you know whether the Refugio grant was surveyed or not?
A. Yes, sir.
Q. This Ancon de Cobreña, is it or not within the Refugio grant as surveyed?
A. A part of it is taken in by the survey.
Q. This alamo, that you spoke of, where is that with respect to the Refugio grant? Is it within or without the Refugio grant?
A. This line, right here at this alamo, was the one made originally by Father Ortiz.
Q. That is the line of the Refugio grant?
A. Yes, sir.
Q. Jose Maria Garcia had land in the Refugio grant, did he not?
A. Yes, sir.
Q. Right there at the south end of it?
A. Yes, sir.
Q. And that was the line that Father Ortiz mentioned as the boundary of his land?
A. Yes, sir. Don Jose Maria Garcia used to say that that was the boundary of his land.
119 Q. That boundary was the boundary of the land that he had under the Refugio grant?
A. Yes, sir.
Q. Are you pretty well acquainted with that country down the river?
A. Yes, sir.
Q. How long since you have been to El Paso?
A. Sometimes I go every month, or eight days.
Q. You go there right often?
A. I have now my stock right there in that grant of Jose Maria Garcia that is being investigated; and my horses and other interests there.
Q. You are not a surveyor, are you?
A. No, sir.
Q. You do not know exactly how this old river ran with respect to how the new river runs?
A. No, sir. The river some days follows to one place and some days to another.

Q. And at some places the old river is very close to the new river, and at other places it is very much fa'ther?

A. Yes, sir.

Q. The old channel was close to where the new channel was formed for about six miles there?

A. The water flowed each way; but it jumped over it—cut through it—in 1884.

Q. You say in 1884 that this river changed?

A. Yes, sir.

Q. Up to that time it ran in exactly the same place it did when you first knew it?

A. Yes, sir.

Q. All along on the east side of the Santa Teresa land?

A. The river used to run there in 1884, and after 1884 it cut across on the other side, and now it has been changed a little from the west.

Q. Do you know where the monument between Mexico and the United States is; the monument that is enclosed with a fence down below the railroad bridge?

A. Yes, sir.

Q. Do you know where the El Paso brick factory is, down there?

A. Yes, sir.

Q. Is this monument below that?

A. A little ways south.

Q. Below the factory?

A. Yes, sir.

Q. Do you know where this Bado de Morelos is?

A. Yes, sir.

120 Q. Where is this Bado de Muleros with respect to the boundary line—the monument, up the river or down the river from it?

A. Above.

Q. Where is it with respect to this brick factory, above or below?

A. It is above.

Q. Do you know where the railroad bridge going to California is located?

A. Yes, sir.

Q. Where is this Bado de Muleros with respect to that bridge, above or below?

A. The bridge is below. The Bado de Muleros is above.

Q. How far is the Bado de Muleros above the railroad bridge?

A. About five or six hundred yards.

Q. And the Ancon de Muleros, where is that with respect to the Bado, above or below?

A. It is above.

Q. How far is the railroad bridge from the Ancon de Muleros?

A. About a mile, more or less.

Q. And the Piedras Paradas is still further up the river than the ancon?

A. Yes; much more.

Q. How far is it from the railroad bridge up the river to the Piedras Paradas?

A. At least two miles, or a little more.

Q. When did you say that you first knew this property; how old were you?

A. I was about twelve or fourteen years old.

Q. What year was it that you first knew it?

A. I knew it when I must have been about twelve or fourteen years old. I was there looking after cattle and horses with my father.

Q. I believe you said that you had known it since 1852?

A. Yes.

Q. When did you first see the Alamo up there?

A. I knew it in '52. I was there.

Q. You said it was in '52 that you saw this cross on the tree?

A. Yes, sir. It was a very conspicuous cottonwood tree. It was a very straight tree, and the cross was about two feet long.

Mr. CATRON. Q. What is the first ancon below Piedras Paradas; is it the Ancon de Muleros, or some others?

A. It is the Ancon de Muleros.

Mr. POPE. Q. The river makes a great many bends down below the Piedras Paradas.

Q. Every time it makes a bend it makes an ancon?

A. Yes.

121 Q. There are a great many little ancons between the Piedras Paradas and the Ancon de Muleros, is that not true?

A. There are many. At the present time even the road has been destroyed on the river. The road runs clear to the hills.

Q. At that time, when you first knew this property, there were a great many ancons between the Piedras Paradas and the Ancon de Muleros?

A. Yes, sir. The highway used to cross over that point of the river.

Mr. CATRON. We offer this map in evidence. (Plaintiffs' Exhibit A.)

The COURT. Adjourned until two p. m.

The hour of two p. m. having arrived, the court resumed the further hearing of the above-entitled case. Mr. Pope resumed the further cross-examination of Vicente Garcia.

Q. What did you say your father's name was?

A. Rafael Garcia.

Q. And his father?

A. Francisco Garcia.

Q. And what was the name of Francisco Garcia, if you know?

A. I only knew him by the name of Francisco Garcia.

Q. Did you know a man known as Francisco Garcia y San Juan?

A. Yes, sir.

Q. Who was he?

A. There was another Francisco Garcia, a son by the name of Francisco Garcia.

Q. Who was this Francisco Garcia?

A. My grandfather.

Q. And his name was Francisco Garcia y San Juan?

A. I think that he belonged to the same family.

Redirect examination by Mr. CATRON:

Q. Look at this map and state whether or not it correctly represents the situation of the Santa Teresa grant.

A. Yes, sir. From the Cobreña south there is a hill that is called the Alto de Cuarones. At Los Cuarones the river used to run very far to the east, and that place where the river used to run in '63 is very clearly defined yet.

Q. There is a little place marked La Isla, where is that—what is that?

A. It is an island there above La Cobreña.

Q. How is it formed?

A. It was formed by the river. The river used to run to the
122 east, and then it took to the west, and then it run on both sides, and that island remained in the center.

Q. Whereabouts is the Ancon de Muleros?

A. I do not know. It is here; it is right here.

Q. Do you know how to read and write?

A. Very little. I can not see very well; my eyesight is not very good. I can not see to write letters any more.

Q. Are these two streams represented on the map? Taking the top of the map as the north, which one is the present current of the river?

A. At the present time it runs here on the place Rio Nuevo, on the west side. It runs on the west side; that new channel there.

Recross-examination by Mr. POPE:

Q. You say you can not read or write?

A. No, sir.

Q. You can not read these various names on this map, then?

A. I can not.

Q. So that you can not tell whether these places that are named here are correctly represented or not, can you?

A. I think they are.

Q. If you can not read the names that are on there, how can you tell whether they are correctly represented?

A. I refer to the bends of the river.

Q. The bends of the river, then, you think are correct?

A. I think so.

Q. That is the only part of this map that you can testify to as being correct?

A. Yes, sir.

Q. How far is that La Isla above Cobreña?

A. It is almost opposite; very little above.

Q. About how far above?

A. I think that the line of La Cobreña is on the opposite side. It is not more than three or four hundred yards.

Q. You have spoken of La Isla as being above Cobreña; do you mean up the river or down the river?

A. It is above; up the river. One is up the river and the other is down the river.

Q. Which is up the river?

A. The large island is up the river, and the lower one is a small island and about five or six miles. At the Corral de Tapia a man by the name of Escoval had a ranch with stock in company with another man named Armidons.

Mr. CATRON. Can you point out on this map about where the Corral de Tapia is on the map?

123 A. I can not tell exactly; I can not see very well. I think it is about here. [Undesignated.]

EUGENE VAN PATTEN, sworn on the part of the claimants, testified upon direct examination by Mr. Catron as follows:

Q. State your name, age, and residence.

A. My name is Eugene Van Patten; I am fifty-four years old; I live in Las Cruces, New Mexico.

Q. How long have you resided at Las Cruces and in that vicinity?

A. Forty-one years.

Q. Are you acquainted with a tract of land called the Santa Teresa grant?

A. Yes, sir.

Q. State about where it is situated, in a general way.

A. It is situated in the extreme southern portion of Doña Ana County, on the line of Mexico and New Mexico—old Mexico and New Mexico—on the west side of the river.

Q. How long have known that tract of land?

A. Since 1859, well.

Q. Who was the owner of this grant of land?

A. Jose Maria Garcia.

Q. Where did he reside?

A. He lived at Amoles, in Doña Ana County.

Q. About how far from the tract of land where he lived?

A. From the northern boundary; I think it was about, maybe, six or seven miles.

Q. North of it?

A. Yes, sir.

Q. Did you ever live on that tract of land?

A. I did.

Q. What year?

A. In 1865 and '6.

Q. How did you happen to be there?

A. Went there to live. Planted trees and lived there with my family for very nearly a year.

Q. On what conditions?

A. For certain portions of the land—the lower portion of the land.

Q. Is that Jose Maria Garcia living or dead?

A. Dead.

Q. Do you know what the northern boundary of that tract of land is?

A. Yes, sir; I do. The northwestern boundary is now where the northeast used to be.

Q. You mean the corner?

A. Yes, sir.

Q. The northwest corner and the southeast corner?

A. Yes, sir.

Q. Where is the northwest corner?

A. It is Cobreña. It is at Cobreña; out on the Ceja; a mound of rock and sandstone are still there; still a mound there. There is a hill there.

124 Q. Is that cut from the Rio Grande?

A. Yes, sir. It is a bleak sand hill, there where it is called plains, just after the plains comes.

Q. The edge of the mesa, the first mesa west of the Ceja?

A. Yes, sir.

Q. Out at the edge of the mesa?

A. Yes, sir.

Q. How long have you known that monument?

A. I have known it from about the year 1864.

Q. What was its condition in '64—this monument?

A. It was larger than it is now.

Q. What kind of material is it made of?

A. It is sandstone, put in a pile.

Q. Does the weather have any effect upon it?

A. Yes, sir; the rains there eat it.

Q. Is there any portion of that monument there now?

A. Yes, sir.

Q. When did you last see it?

A. I saw it sometime in May of this year.

Q. You spoke of the northeast boundary corner; what was it?

A. That was a cottonwood tree.

Q. Did you ever see it?

A. Yes, sir.

Q. Where was it situated?

A. It was situated almost in a direct line out from this monument in the river. The river was then beyond this place.

Q. And where it is now?

A. No; the river is changed. The river was farther east than it is now.

Q. About how far would you put it from the monument on the hill?

A. The tree, I think, about five thousand yards; a little more or less.

Q. Where was it situated—in the bottom of the river or not?

A. Yes, sir.

Q. How close to the river when you first saw it?

A. About two hundred or two hundred and fifty yards.

Q. What has become of that?

A. The river has taken it away; washed all the walls away from there.

Q. What did you do on this land when you occupied it?

A. I put out trees, and built a house, and a nice vineyard.

Q. How did you happen to know this boundary monument of that grant?

125 A. Because that man, Jose Maria Garcia, often wrote a letter.

Q. How are these monuments regarded by the people generally in that community—generally reputed as to these being monuments?

(Mr. Pope objects to the question as being immaterial and incompetent.)

A. Everybody says so. The oldest men say that they are the monuments.

Q. Are they generally recognized as boundary monuments?

A. Yes, sir.

Q. And that by the old people you know?

A. Yes, sir; and live at Amoles, right there.

Q. What is the nearest settlement to this grant; what was it about '64?

A. The nearest settlement we called Amoles, and then El Paso is next.

Q. How many people lived at Amoles when you first knew these boundaries?

A. Between five and six hundred people.

Q. And these people, how did they—what was the general repute among them as to these being monuments?

A. Everybody knew them, and persons used to go to El Paso for supplies once a month, and we used to go right along the river; we used to run right down through that land and camped in it many times, and the cottonwood tree we camped under. I knew it well.

Q. What did the people say about the boundary being a tree?

A. They said it was; it was a famous tree there.

Q. Do you know the Piedras Paradas?

A. I do; well.

Q. Do you know the Ancon de Muleros?

A. Yes, sir; I do. That is just about where I lived in '65.

Q. You lived on the Ancon?

A. Yes, sir.

Q. That was below the Piedras Paradas?

A. Right just at Muleros.

Q. You went there in '64; it was in '65 you lived there?

A. Yes, sir.

Q. Just below the Piedras Paradas, in the Ancon de Moleros?

A. Yes, sir.

Q. Were you inside or outside of the grant?

A. On the estate of Garcia, and several other people who belonged to the Garcia estate. It was Garcia's estate.

Q. Do you know that tree which was in the south boundary, near Piedras Paradas, that was held as the boundary of that grant?

A. Yes, sir; I saw that tree. There was one above and one below.

126 Q. You say one below and one above; where?

A. One just beyond at Muleros and one right in front, below; halfway between Piedras Paradas and Muleros.

Q. Do you know where the Bado de Muleros is—the crossing?

A. Yes, sir.

Q. Where is the Bado de Muleros with reference to the Ancon de Muleros?

A. It is just inside of the Ancon de Muleros, just near the upper end.

Q. It may be a mile below the upper end?

A. The Bado; yes.

Q. Does the Ancon extend down below the Bado?

A. Yes, sir.

Q. There is a point where the river makes a sharp bend that would be known as the Ancon or bend?

A. It makes a bend right in the Ancon de Muleros.

Q. How close to the ford is the bend in the river?

A. The bend in the river, formerly it used to run in the lower end of the bend.

Q. Look at this map and state if you have ever seen that.

A. I did.

Q. State if it correctly represents the objects.
A. Yes, sir; it does.
Q. Where it is marked Rio Biejo is where the river used to run?
A. Yes, sir.
Q. Where it runs now is Rio Nuevo?
A. Yes, sir.
Q. Do you know how that river has been since it changed its channel from the place where it used to be marked Rio Biejo?
A. Yes, sir; in 1884 it changed.
Q. When you first knew that river state whether or not there was any evidence that it had changed from the place where you first knew it.
A. Yes, sir.
Q. Is there any new channel along on the west side?
A. Yes, sir; there is. It is right there, just at this point.
Q. Where you have the Rio Nuevo marked?
A. Yes, sir.
Q. Do you know when the river left that old channel?
A. I do not know.
Q. That was before 1884?
A. Yes, sir.
Q. Where is Cañutillo on that map?
A. It is about here somewhere, marked Cañutillo. There is a little ranch there.
Q. How far is the Ancon de Muleros below Piedras on the river?
A. I suppose about three miles.
127 Q. Are there any other Ancons known as Ancons at all on the river from the Piedras Paradas down to the Ancon de Muleros?
A. None whatever.
Q. Where is the Ancon de Muleros with reference to the Southern Pacific Railroad bridge?
A. It is just above that, four or five hundred yards.
Q. Do you know where the international monument between Mexico and the United States is?
A. Yes, sir.
Q. How far below the Southern Pacific Railroad bridge?
A. Five hundred or a thousand yards—I can not tell.
Q. What direction?
A. South.
Q. You never measured it?
A. No; I never paid any attention to it, so far as that is concerned.
Q. Do you know where the southwestern monument of that grant is—about where it is?
A. I was told where it was.
Q. Has it ever been pointed out to you by anyone?
A. Yes, sir; by Garcia himself. It has been covered up with big sand hills.
Q. Where did he live?
A. He lived right out from the hill, the continuation of the Bado de Muleros; right in there.
Q. The western boundary is what you have marked Ceja on this map?
A. Yes, sir.

Q. Where is the southwestern corner shown to you by Jose Maria Garcia?
A. It was right in front of this line, inside of the Mexican line there.
Q. South of the Mexican line?
A. Yes, sir. There is a big sand hill.
Q. In what direction generally does the river run from the Bado de Muleros?
A. A southerly direction.
Q. Is it south?
A. It is east a little.
Q. When you occupied that grant in 1865 under Jose Maria Garcia you say that grant was not occupied by any other person?
A. No, sir. Several other persons pastured their stock above us. Enriquez and a great many others pastured their stock above there.
Q. The people who pastured their stock there, were they trespassers, or had they permission or license?
A. Those that pastured had permission.
128 Q. What was the general reputation, if any, in that vicinity and neighborhood, as to there being a grant there belonging to the Garcias, when you first knew it?
A. Nobody disputed it, that grant. Everybody that I ever saw said that that was Garcia's grant.
Q. State whether or not it was respected by everybody.
A. Yes, sir.
Q. By the people of Juarez and El Paso and Amoles?
A. To my positive knowledge, they asked permission to take these rafters and wood and things out by the people, down to El Paso. We gave them permission to take these things out. White's ranch is below it.
Q. How did the people regard or recognize it; did you ever hear them say anything about it?
A. No; nobody lived there.
Q. Any houses at all there?
A. Nobody lived at White's ranch.
Q. Nobody lived between Amoles and El Paso, on the east side of the river, then, as I understand you, when you first knew this property?
A. No, sir.
Q. The only people were at Amoles on the north, and Juarez on the south?
A. Yes, sir.
Q. And these acknowledged and recognized this property as belonging to the Garcias?
(Mr. Pope objects to this question as leading.)
A. They acknowledged it as belonging to the Garcias.

Cross-examination by Mr. POPE:

Q. You first knew that place in '59, and all you have stated about possession and recognition by the people was since 1859?
A. Yes, sir.
Q. You lived on this tract?
A. Yes, sir; I did.

Q. Is it not a fact that a great many people have pastured on and around that tract, ever since you have known it?

A. Yes, sir.

Q. And brought their flocks down to the river?

A. Yes; people crossed from El Paso up the right bank of the river and pastured on the plains out to the mountains, and come down for water.

Q. And that place has been used by a good many people, both for pasturage and water, who did not claim under Jose Maria Garcia?

A. Yes; they did with his permission, because I was there to stop it.

129 Q. When you were there to stop it a great many tried to pasture there?

A. Yes, sir; they did, and was taken out.

Q. You had to run a good many off?

A. Yes, sir; I did.

Q. That was when you were living there people tried to go in to pasture and get water there?

A. Yes, sir.

Q. They did not show any very great recognition of that?

A. They knew it was his property.

Q. You did not undertake to prosecute the people who came there to pasture and water, did you?

A. Yes, sir; after I stayed there some time they did not; they pastured by his permission; some times he sent word to let them carry or take wood and rafters and things out.

Q. That is what he claimed?

A. Yes, sir; he would give them written permission.

Q. You were there as his agent at that time?

A. Yes; in one respect, and agent for myself; I was to take a portion of that land there.

Q. It was understood that if you succeeded in getting the grant confirmed you were to have a portion of the land?

A. Yes, sir: we had no title, and it was understood that it was a Mexican grant, Spanish grant, and that there was no survey of it made.

Q. You at that time were his agent, and had an interest in this grant, did you?

A. Yes, sir.

Q. You still have an interest in the grant?

A. No, sir; I have not.

Q. You acted as agent in getting testimony?

A. Yes, sir; I have.

Q. You were present at the hearing at El Paso?

A. Yes, sir.

Q. And brought these witnesses up here to testify at this time?

A. Yes, sir.

Q. You were employed for that purpose?

A. Yes, sir.

Q. Do you remember when this preliminary survey was made of this tract?

A. No, sir.

130 Q. You do not know anything about that survey?
A. I just know the Elkins survey; I knew that survey by John Elkins who surveyed it, if that is the survey.
Q. This is by John Shaw, United States deputy surveyor, made in 1883.
A. I do not know about that.
Q. You do not know about that survey, made in 1883 under the Government?
A. No, I do not.
Q. Do you know anything about the boundaries or monuments on that survey?
A. No, sir; I do not.
Q. You do not know, then, whether a preliminary survey of the Santa Teresa tract has been made by the surveyor-general's office?
A. No, sir.
Q. You say you know where this railroad bridge is?
A. Yes, sir.
Q. The Southern Pacific Railroad Bridge—how far north of that is White's ford?
A. I think, maybe, three miles, or two and a half, on the west of the river.
Q. There is pasture all along on the bank of the river?
A. No, sir; some distance from the river.
Q. How far west of the river?
A. Three hundred yards, maybe four hundred yards.
Q. In which direction from the bank of the present river?
A. About west.
Q. Three or four hundred yards?
A. Yes.
Q. How far west of the old river, as you understand it?
A. I should think, maybe, six or seven hundred yards.
Q. This Bado de Morelos is, you say, down the river from this ford of White's?
A. Yes, sir.
Q. How far up the river is the Southern Pacific Railroad Bridge from the Bado de Morelos?
131 A. I think half a mile; maybe three thousand feet.
Q. And the Ancon de Moleros is how far above this ford?
A. Very little above the ford.
Q. Where do you consider the Ancon?
A. This line here; it is certainly three miles below the ford of White, and then takes a direction east by west.
Q. So this line you run, then, is between the Piedras Pardas and the Bado de Muleros?
A. Yes, sir.
Q. And about how far north of the Bado de Muleros?
A. About half a mile.
Q. And about how far north of the Southern Pacific Railroad Bridge?
A. It would be about a mile and a quarter or a mile and a half.
Q. Suppose this southern boundary was an east and a west line running through that point, it would not intersect the boundary line between Mexico and the United States, would it?

A. It would just be inside of these lines here; it would be inside, and go into Mexico, inside of Mexico.

Q. A line to go through that would go into Mexico?

A. Yes, sir; go into Mexico line, just go right in the Mexico line—the Mexican international line.

Q. An east and west line?

A. That line would go that way, and these other lines this way; the two lines would not be parallel.

Q. If the international boundary line is an east and west line, then an east and west line run through this Ancon de Muleros would never intersect it, would it—run the north boundary of the Santa Teresa grant; if it is an east and west line, it would never intersect the international boundary line?

A. I do not think it would.

Q. What do you understand is the first monument of the Santa
132 Teresa grant on the river, at the river?

A. I will have to answer that in two ways. I understand the line ran down below that line that he claimed, and afterwards they claimed to the river; that is the line higher up.

Q. Where is that line he claimed?

A. Here, marked from V P to V P.

Q. Where is that with respect to the present international boundary line?

A. That is the one I am speaking of, the third monument from the river.

Q. Suppose the Santa Teresa grant was above the Ancon de Muleros; it would not come down there?

A. Yes, sir; it comes below the monument.

Q. Suppose it was a line north of the Ancon de Muleros; it would not come down to the international boundary line?

A. No, sir. Here is what I have reference to: This is the Southern Pacific Railroad bridge, marked S. P. bridge, just like that; this monument is down here, marked I. N. M., below the railroad bridge. That line runs this way here; that is the Ancon de Muleros, just about like that.

Q. Is that line marked V P to V P what you understand to be the south boundary of the Santa Teresa grant?

A. Yes, sir; I do.

Q. That is what you understood from Jose Maria Garcia?

A. Yes, sir; I understood he claimed still below that.

Q. This line V P to V P is what he had fixed for him by the Mexican Government?

A. Yes, sir; but still it was not satisfactory to him, but he claimed it below.

Q. You were not living there at the time they fixed it?

A. No, sir.

Q. This line V P to V P is correctly made?

A. Yes, sir; to my knowledge it is.

Q. And that comes to the river above the Bado de Muleros?

A. Yes, sir; just above the Bado de Muleros.

133 Q. And it comes out near to Whites Ford?

A. It runs below—south of Whites Ford, two miles and a half.
Q. It runs some distance north of the Bado de Muleros?
A. Yes, sir.
Q. And some distance north of the Southern Pacific bridge?
A. Yes, sir; north of the Southern Pacific bridge—no; it is north by west.
Q. This line you have made is a west line?
A. Yes, sir.
Q. And that line is on the north side of the Southern Pacific bridge?
A. Yes, sir.
Q. How far north of the Southern Pacific bridge does it run?
A. Maybe over a mile and a half.
Q. This grant of Jose Maria Garcia was just about a mile and a half north from the present Southern Pacific bridge?
A. Yes, sir; more or less. I could not tell the distance, but he claimed below it.
Q. This line, then, is more than a mile and a half north of that international monument, near the river?
A. Yes, sir.
Q. Very little?
A. Yes, sir.
Q. So that this line marked V P to V P is a distance of a mile and a half north of the international monument there near the river?
A. That might run a little less than a mile and a half; I said about a mile and a half. I mean up to the Muleros line.
Q. That old river bed that you spoke of, you say you can see that down to El Paso?
A. Yes, sir; I mean the old one you can.
Q. The old river bed you can see down to El Paso?
A. Yes, sir.
Q. The one farthest east?
A. Yes, sir.
Q. What is the greatest distance between the old river bed and the present river bed?
A. Some places it is a mile and a half.
Q. And at other places it comes along very close?
A. Yes, sir.
Q. Where does it come into the present river, the old river bed?
134 A. It comes right in at the crossing at Muleros, where they cross the ford of Muleros; it comes right in there.
Q. So it comes in just below the Ancon de Morelos?
A. Yes, sir.

Redirect examination by Mr. CATRON:

Q. Is that Ford of Muleros in the Ancón de Muleros or not?
A. Yes, sir; it is a half a mile in.
Q. What is the Ancon de Muleros?
A. It is a point in the river where the river turns; ancon means corner, bend.

Q. When you speak of the ancon being above the ford, you mean the portion of the bend of the river above the ford, that portion of it?

A. Yes, sir.

Q. Where is the place which makes a sharp part of the bend?

A. It is right at the Muleros Ford; right at the ford, just a little below the Muleros Ford, there where it empties through the mouth.

Mr. POPE. Q. You say the bend is out where the Ford of Muleros is?

A. Yes, sir; half a mile and below it.

Q. And that is out how far above the Southern Pacific bridge?

A. Half a mile or three quarters.

Q. Mark on this map, plaintiff's exhibit 16, where the Southern Pacific bridge crosses.

A. Marked "S. P. Bridge."

Q. Indicate where the International Monument is in the valley?

A. It is down below, marked "I. N. M."

SANTA FE, NEW MEXICO, *September 17th, 1898.*

I hereby certify that the above and foregoing thirty-four (34) pages contain a full, true, and correct transcript of all the testimony offered in open court on the hearing of the above-entitled case.

W. J. MCPHERSON,
Official Stenographer.

Indorsed: Filed in the office of the clerk Court of Private Land Claims, Aug. 30, 1899. Jas. H. Reeder, clerk, by I. L. Chaves.

135 In the United States Court of Private Land Claims, Santa Fe, New Mexico. September term, 1898.

M. R. PENDELL ET AL. *vs.* UNITED STATES. } No. 168. Santa Teresa grant.

Depositions taken in the above-entitled case in the Federal Building, Santa Fe, New Mexico, October 5th, 1898, before Fuller, A. J.

Appearances: Messrs. Catron & Gortner for the claimants; William H. Pope, assistant U. S. attorney, for the Government.

Mr. CATRON. We introduce in evidence from file 115, number 2, in red ink, from the surveyor-general's office, which has been identified by the witnesses, as the foundation of this grant. (Marked "Plaintiffs' Exhibit No. A".)

Also introduce in evidence copy of the originals at Juarez. (Marked "Plaintiffs' Exhibit C," and being in words and figures the same as Plaintiffs' Ex. A.)

Mr. POPE. These two papers just tendered are copies, and tendered in evidence by claimants as evidence of their grant are improper, immaterial, irrelevant, and incompetent; no proper foundation has been laid for their introduction, and as constituting no valid basis upon which a confirmation could be entered in this case.

Also introduce in evidence seven conveyances to the Escobars of this property. Two of these deeds we have mislaid; I have them, and
136 I will produce them on the trial; I think they are included in that lot there. They are in plaintiffs' Exhibit B. There is a deed

conveyance from one of the Escobars to the other which we have also mislaid, and we will introduce that in evidence and will produce it here on the trial. The seven conveyances are as follows:

Sixto Yrigoyen, heir of deceased wife, Franca Albo y Garcia to Jesus Escobar y Armendariz. (Marked "Plaintiff's Ex. 5.")

Tereza Apodaca de Garcia, as heir of deceased husband, Franco. Garcia y Noneza to Jesus Escobar y Armendariz. (Marked "Plaintiffs' Ex. 6.")

Apolonia G. y Norieza to Jesus E. y Armendariz. (Marked "Plaintiffs' Ex. 7.")

Pedro Garcia and Rodrigo Garcia and Margarita Garcia to Jesus Escobar y Armendariz. (Marked "Plaintiffs' Ex. 8.")

Jose Ma. Garcia and Rafael Garcia, executors, etc., to Pablo Meranda. (Marked "Plaintiffs' Ex. 9.")

Pablo Meranda to Jesus Escobar. (Marked "Plaintiffs' Ex. 10.")

Jose Ma. Garcia, Rafael Garcia et al., to Jesus and Jesus Ma. Escobar. (Marked "Plaintiffs' Ex. 11.")

Also a master's deed given by a master of the 3rd judicial district court, in the county of Dona Ana, in the foreclosure of a mortgage made by one of the Escobars, the one to whom the other transferred, to Mr. Pendell, the original party mentioned here in this suit as the claimant, and which deed is with the other three deeds that we have mislaid and which we will produce on the trial. I do not remember just now any other deed which we have not here, but in case we neglect to introduce any deed to the property connecting these parties with the grant, we ask leave to introduce them on the trial, and we will furnish the Government with copies of them as soon as we have them. In order to be sure about it I wish to make parties plaintiff to this suit Garcia, and Juan de Dios Garcia, and ask that an order be entered interlining their
137 names in the petition; they both reside in Juarez, and the testimony shows that they are heirs, and we ask leave to amend the petition.

Mr. POPE. We object to this amendment on the ground that this is an imperfect grant; the rights of the claimants in this case rests upon the title as here presented by the claimants who filed their case before the expiration of the limitations provided by law.

We also now introduce in evidence the testimony taken before Judge Stone, at El Paso, Texas, and Juarez, Mexico, being the testimony of the following witnesses, taken during this year: Juan Abalos; Pedro Melenudo; Pedro Balizan; Gregorio Herrera; Jesus Velarde; Sostenes Rodriguez; Solomon C. Shutz.

I will introduce the testimony, all the testimony taken before the surveyor-general in this case. I will introduce witnesses to prove the death of them, and such as I do not prove the death of may be stricken out. This testimony was taken under a commission from the surveyor-general's office by John H. Crouch, clerk of the district court at Mesilla, Dona Ana County. (Marked "Plaintiffs' Exhibits 12 and 13," in red ink.)

I will introduce proof as to Solomon Shuts' certificate made at that time, and Barella, who was then the second alcalde and judge of the first instance; they go in subject to any objections you may wish to make, Mr.

Pope. The commission also in this case we wish to introduce. (Attached to Plaintiffs' Exhibit 13.)

Mr. POPE. We object to the introduction of each and every one of these papers, and the testimony of each of the witnesses mentioned, on the ground that they are immaterial, irrelevant, and incompetent, and on further inspection of the papers tendered we ask leave to submit further objections.

138 Also introduce the map from the surveyor-general's office, file 115 (marked "Plaintiffs' Exhibit No. 14").

Also introduce in evidence the opinion of Surveyor-General Atkinson in the case on the hearing before him (marked "Plaintiffs' Exhibit 15").

(Mr. Pope objects to it because it is immaterial, irrelevant, and incompetent.)

Mr. POPE. The only papers you introduce from the surveyor-general's office are these five papers the stenographer has marked "Plaintiffs' Exhibits Number A, 12, 13, 14, and 15"?

Mr. CATRON. Yes, sir.

Mr. POPE. I wish to introduce in evidence the opinion in this case of Mr. George W. Julian (marked "Government's Exhibit No. 1").

(Mr. Catron objects to it because it is impertinent, irrelevant, immaterial, improper, and incompetent, and being a decision rendered extrajudicially by George W. Julian when he had no control as surveyor-general, because the case had passed out of his jurisdiction to Washington and was then pending before Congress.)

L. H. DAVIS, sworn on the part of the Government, testified, upon direct examination by Mr. Pope, as follows:

Q. State your name, age, residence, and profession.

A. My name is L. H. Davis; I am 44 years old; I reside in El Paso, Texas; my profession is law.

Q. How long have you lived in El Paso, Texas?

A. Since '81—in the summer of '81.

Q. Did you know while residing in El Paso, Texas, a man named Jesus Escobar y Armandaris?

A. Yes, sir; I did.

Q. What official position, if any, did he hold at that time?

139 A. During the time that I knew him he was Mexican consul; that is, he represented the Mexican Government as consul at El Paso, Texas.

Q. In what year did you know Mr. Escobar?

A. I do not remember the number of years I knew him. I was acquainted with him from '83, I think; '83, '84, '85, '86, '87, '88, and along up to the time that he died. I do not remember the year that he died; I think in '89—possibly '90; I do not remember just the time.

Q. Have you ever known in the vicinity of El Paso of a claim to a tract of land called the Santa Teresa grant?

A. Yes, sir; I knew of it by reputation and hearsay.

Q. Did you ever know of it in connection with this Mr. Escobar?

A. Yes, sir; I did.

Q. Just state what you know in connection with him in any conversation you had with regard to it as to the boundaries of this tract.

(Mr. Catron objects to the question and answer called for as to any conversation he had with Escobar as being incompetent, improper, immaterial, impertinent, and not proper testimony in any sense of the word.)

A. I saw Mr. Escobar one time in regard to the grant in this way: I was quite familiar with the tract of land from believing that there was coal deposits there, and on enquiring about it from the surveyor-general's office learned that it was unsurveyed land; that must have been in '87. I had learned some way that Mr. Escobar claimed to be the owner of a tract of land called Santa Teresa grant; therefore I visited him to see him about it with reference to seeing whether title could be obtained from him to the tract of land, that I desired for a double purpose—one on account of its what I believed to be coal measure, and the other I thought it would be valuable in a speculative way, possibly
139½ in laying out a town site, being immediately on the border, that it would make a fine location for an international town. I laid the proposition before Mr. Escobar and he assured me that he was the owner of this title. Then the question came up as to what portion of the land where the locality was that I wanted, and I described to him as being a tract of land beginning at the intersection of the international boundary line, where the large monument is near the river bank, extending westwardly a distance, so that by taking the entire tract it would make a mile square, 640 acres, I think. Immediately he told me, "I do not claim in this case grant the land between the international boundary line and the Southern Pacific bridge," and I told him I thought that he was mistaken about that, and he told me positively that he knew better than that, and then, subsequent to that, I got a map. I told him that I had a map from the surveyor-general's office. It was sent to me one time, and that described it at the beginning of the line. He told me that I was mistaken.

Q. Have you that map?

A. I brought that map with me; yes, sir. This is the map that I showed to him (marked "Government's Exhibit No. 2"), and he said that the tract of land that he claimed as north of the Southern Pacific track, above the bridge, and described the locality as being between the bridge and a ranch house that was at the place called Rodger's switch, between these points, and I told him that he had seen that monument, and he says, "That is the monument that I refer to; that is the corner, the initial point of this Santa Teresa grant." I subsequently visited in a few days after that. I visited the locality again and looked over the points that he referred to and found the monument just as he had
140 stated. The point was, as near as I can state, not being a surveyor, a little over a quarter of a mile northwesterly of the Southern Pacific bridge, possibly between a quarter and a half mile, as you follow along the track and close to the bank of the river. He said to me that he made no claim whatever to the tract of land that was south of the Southern Pacific Railroad and south of a line from this monument; that that was the initial point of his grant. He described the tract as running along the western bank of the Rio Grande River. I do not remember, I do not know, the number of acres or leagues or whatever it might be. It was quite an extensive tract to get, as he claimed.

(Mr. Catron objects to this answer as being improper and incompetent

evidence, being purely hearsay, declarations of the party that has no interest whatever in this grant, and his heirs have no interest in it, and a party who has no connection whatever with with this Escobar, whose declarations are attempted to be detailed, and also the declarations of a party who is now deceased, and no opportunity to get the statements of the party himself, it being impossible to get the declarations of the party himself.)

Q. What did Mr. Escobar say at that time as to the south boundary in this plat being correctly represented—the south boundary of the grant he claimed?

A. He said this map was absolutely wrong and it was not correct at all. He said this was not a correct map of the land; that his tract was north of the railroad, on the bank of the river, the western bank of the Rio Grande River, in the valley; that he claimed nothing south of the railroad—Southern Pacific Railroad track on the west bank of the Rio Grande River.

Q. I wish you would indicate on that map, as near as possible, the location of the boundary indicated to you by Mr. Escobar as the
141 initial point of his grant.

A. I mark it "S. P. R. R. bridge." It crosses in a northwesterly course, when it reaches this point where the bridge crosses the river at "A." To that point the distance would be in the neighborhood of two thousand feet, I should think, to where the road takes a bend and crosses an arroyo under a little bridge marked "B." On this map the road on the river runs nearly north to a distance, I should think, of half a mile from that point B. This map is entirely wrong in that respect; it should run in this way, indicated by the dotted lines I make. The river runs north before it takes a bend half a mile and then turns to the northwesterly direction from the north to 20 to 30 degrees west, and the railroad runs nearly parallel with it. There is a valley between the railroad and the river, level land, probably a couple hundred yards—a few hundred yards. The railroad runs directly west, as indicated, for nearly half a mile and 20 degrees west; that would be my belief as near as I can say as to the point of the compass without actual survey. On the north of this point B, about from one hundred to two hundred feet north of this railroad track where it crosses this trestle bridge that is there now—culvert.

Q. Indicate on that map just where that is?

A. I should say here on the dotted lines at C. It may be 150 or 200 feet from where, north of where, this bridge is. It is a small bridge over the mouth of this arroyo or cañon. The first one running west of the Southern Pacific bridge is where this initial one is—was—at the point marked C; there is directly across the river over there quite a large cottonwood tree.

Mr. CATRON: What called forth that remark from you?

A. I do not mean to say that he told me that was there—that cottonwood tree; the only thing that I know there is a cottonwood tree nearly opposite that point.

142 Q. This bridge—do you mean the Southern Pacific bridge, as it is generally known, or what?

A. I am talking about a little bridge over the cañon that goes from here, at the point B, and the initial point of this monument would be right above it, in a northerly direction.

Q. What kind of a monument was this?

A. It was a pile of rocks; my recollection it was about four feet high, between three and four feet high; quite a great deal of brush around that; it was not right on the river; it was about probably fifty feet west from the bank of this river.

Q. Do you know the name of this little cañon that this small bridge crosses?

A. I do not know of any name for it; I know the place itself; the cañon runs between the mountains called Muleros; I do not know what that means; there is a mule trail and a low range of sandstone foothills that runs parallel with the Southern Pacific track.

Q. Does this cañon run between the main peak and these little sandstone foothills?

A. I call it a foothill.

Q. About what is the distance from the international boundary line at the river there on the Southern Pacific bridge?

A. I can not tell you exactly the distance between the boundaries; I measured it exactly several times, but it has been so long ago that I could not remember it now; my impression and opinion of it I might tell you, but I could not tell you anything like accuracy; I do not know.

Q. About how far is it?

A. I should think probably close to a mile; from the international boundary to where this track crosses I should judge in the neighborhood of a mile; it may be further; I do not know; I measured it several times with a tape line; I located it as coal property in 1887 or 1888; I do not know, before I had this conversation.

143 Cross-examination by Mr. CATRON:

Q. Do you belong to the firm of lawyers by the name of Davis, Bell & Kemp?

A. No, sir; I am not engaged in the practice of law; I am mining at present; I am not in the active practice of the law. I have been a member of the bar at El Paso, Texas, for nearly fifteen years, since '83; at the present time I am improving some coal mines at Bald Eagle Mountains in El Paso County.

Q. How long have you been engaged in mining?

A. In mining speculation I have been engaged since '83, I think. I have never been a professional miner.

Q. How long since you practiced law, if you ever did practice it?

A. Up to, say last fall.

Q. Where did you practice?

A. In El Paso, Texas; I was county attorney there from '90 to '92.

Q. Where did you get this paper markeddefendant's Exhibit No. 2?

A. That is a map that was sent me; I wrote to the surveyor-general for map of this country, and I got it from the surveyor-general's office; I suppose it came by or from his office.

Q. Have you got the letter that transmitted it?

A. No, sir; I have not. If I have, I do not know anything about it.

Q. All you know about this map coming from the surveyor-general's office is mere hearsay?

A. Yes, sir; I have stated that the surveyor-general sent it by letter, stating that he inclosed it.

Q. Is there anything on this map that makes any reference whatever to the Santa Teresa grant?

A. No, sir.

Q. Is there any marks or lines on it that makes reference to the Santa Teresa grant?

A. There is nothing on that that I know of.

144 Q. Are there any marks or lines there undertaking to enclose any tract of land to make an entire enclosure?

A. No, sir; it does not enclose any land; the northern part is left vacant.

Q. Are there any marks on the southern part of it to indicate where that line is?

A. Nothing on it.

Q. Assuming that the top of the map is north, there is a line running off from due east and west along between the west and east, 2 miles as marked on that map, a line which runs about northwest off the top of that map; is there anything to show what that line represents?

A. No, sir; only the directions.

Q. Nothing indicating what that line is made to refer to?

A. No, sir.

Q. Didn't Mr. Escobar inform you what other people were interested in the tract of land in question?

A. No, sir; he did not tell me.

Q. Did you know a man named Pablo Armendariz that lived at Juarez?

A. No, sir.

Q. Did you ever hear of him?

A. I can not say I ever heard of him; I do not know.

Q. Did you ever hear of his owning a portion of that property?

A. No, sir; all I know about this is what I have stated, from Mr. Escobar.

Q. Didn't Mr. Escobar also tell you that his brother was interested that time in the land?

A. No, sir; I did not know that he had a brother.

Q. When did you have this conversation with Mr. Escobar?

A. In '87 and 8; along between those years. It was when I was interested in this matter.

Q. Who have you talked with about your information in connection with this so that the Government got hold of you as a witness; how did it happen that the Government got you?

145 A. In El Paso I was requested to appear as a witness in the testimony that was taken, I believe, by officials.

Q. Who was the officials?

A. I think Mr. Ryan and Mr. Charles White said to me that they would like to have their testimony taken in regard to this, and he mentioned to me this case.

Q. Mr. Ryan is a party—has an adverse interest in this property?

A. That is my understanding.

Q. He is the owner of a brickyard?

A. Yes, sir.

Q. And he is the man that solicited this evidence?

A. Yes, sir; I did not volunteer; I had no interest; my conversation came up in other matters; I am a part owner of a tract of land in Mexico with Mr. Banch—in a tract of about six thousand acres, two thousand feet right below this line—and Mr. Ryan learning that I was somewhat interested in it and negotiated with me to purchase 160 acres of land there with the idea that there was something valuable in that, of course, and our negotiations ran about a month or more, and finally it ended very abruptly.

Q. Did Mr. Ryan tell you that it was claimed that this property crossed over south of the line?

A. No, sir; he did not tell me that.

Q. Did Mr. Escobar tell you that this property of the Santa Teresa grant extended a league west of the Rio Grande River monument and four leagues up and down it?

A. I could not state the amount of territory; he told me what he claimed; I could not tell you what he claimed, whether he said one league or two leagues.

Q. Did he not tell you that he had a tract of land four leagues long and extended to the west of the Rio Grande River one league?

A. I could not say; I do not remember what he told me.

146 Q. I understood you to say that his land lay right in between the Southern Pacific road and the Rio Grande?

A. No, sir; he said that he did not claim to run there between the Southern Pacific Railroad track and the international boundary line; to that he made no claim whatever; that was the tract that I wanted to get.

Q. Did you understand him to mean that the Southern Pacific Railroad ran more to the east than it does now; that he claimed on the west between the international boundary line and the Southern Pacific road?

A. No, sir; my understanding was this, that commencing at this point C, that he claimed to extend westerly whatever distance it was, and thence it went northwesterly in a parallel course with the river; I do not know the number of leagues he told me; it was a large tract; it was a considerable tract.

Q. Where did you live prior to your going to El Paso?

A. I lived at one time in , Arizona, and one time in San Francisco, and prior to that my home was in Michigan.

Q. In 1887 you talked with Escobar; did you understand the Spanish language?

A. Not very well; slightly.

Q. Mr. Escobar did not understand English?

A. He talked very fairly. He talked so fairly that I understood him.

Q. You talked in English?

A. Yes, sir.

Q. You do not profess to say that he talked to you intelligently?

A. He talked intelligently.

Q. You might not have understood him.

A. I understood him perfectly. He had a view to get in partnership in this town site business with myself, but I lost all interest in the matter from that time with him.

Q. You do not know that that map undertakes to represent this grant?

A. I know by the letter from the surveyor-general that was sent me.

147 Q. You have not got that letter?
A. I might find it, possibly.
Q. You have not got it with you?
A. No, sir; I kept the map.
Q. Of your own knowledge, you do not know that this refers to this grant at all?
A. Not of my own personal knowledge.
Q. There is nothing on it to show that it refers to this grant?
A. No, sir; nothing to show that the Santa Teresa grant is involved in it; it is only a map of the locality.
(The introduction of the map marked "Defendant's Exhibit No. 2," objected to and we ask to strike it out.)

Redirect examination by Mr. POPE:

Q. In your conversation with Mr. Escobar, Judge Davis, I will get you to state what line on this map was assumed to be the international boundary line.
Mr. CATRON. I object to all the conversation between Mr. Escobar and Mr. Davis, for the reason that it has been called out on direct examination.
A. I remember this, that this same line as being the same line between Mexico and New Mexico; that is the international boundary line.
Q. Indicate that line that you have described as being the international boundary line between New Mexico and Mexico.
A. The line from D to D; that same line is the international boundary line.
Q. What claim for land were you discussing with Mr. Escobar at this time; was it the Santa Teresa grant?
A. Yes, sir; the Santa Teresa grant; that was the grant; I did not know any other.
(I will introduce that plat in evidence, marked "Defendant's Exhibit No. 2."
Objection to it, because no proper foundation has been laid for its introduction; the testimony given in reference to it is all hearsay, and
148 there is nothing on its face to show what it alludes to, and the witness himself says it is not a correct plat; impertinent, improper, immaterial, irrelevant, and incompetent.)

JOHN P. RANDOLPH, sworn on the part of the Government, testified, upon direct examination by Mr. Pope, as follows:

Q. State your name, residence, age, and business or profession.
A. My name is John P. Randolph; residence, El Paso, Texas; surveyor, civil; age, 42 years.
Q. How long have you lived in El Paso, or when did you first come there?
A. In January, 1884.
Q. Did you know a man named Jesus Escobar during your residence there?
A. I knew the Mexican consul, but I could not tell you his name—his first name.
Q. His name was Escobar?
A. His name was Escobar.

Q. Did you have any conversation or transaction with him in reference to what is known as the Santa Teresa grant in that section?

A. Yes, sir.

Q. What official position, if any, did you hold at that time?

A. I was county surveyor; I had been county surveyor; I resigned.

Q. State the circumstances and substance of that conversation with Mr. Escobar, so far as it relates to the boundaries of the Santa Teresa grant.

(Objection, as impertinent, irrelevant, incompetent—calling for pure hearsay; all the evidence of the party who has any connection with this grant.)

A. I went with him in a buggy up to the bend in the river above the bridge—about a mile above the bridge—on the northern side; he pointed out a locality across the river where his corner was with a view
149 of having me survey it—survey the grant; it was his initial corner, so he said. The next day I went across the river myself on the bridge—over the bridge—and found that corner, but I never made any survey.

Q. About when was that?

A. That was about May, 1887.

Q. Did he state what this initial corner was?

(Objection for the same reasons.)

A. Yes; he said it was the corner of his Santa Teresa grant.

Q. Did he state what corner?

A. The lower river corner.

Q. How far were you from this monument at the time he pointed it out to you?

A. Across the river; I suppose a hundred yards, or very near it; something like that.

Q. I wish you would describe this corner or monument?

A. Just a pile of stone about three feet high, and probably three feet at the base; pile of stone piled up.

Q. Where is it with respect to the river as it now runs?

A. I think it is in the river now; it stood about thirty or forty feet from the bank of the river.

Q. At that time was there any natural object near it that would attract your attention?

A. Well; I do not know of any.

Q. Was there any tree where this monument was?

(Leading.)

A. No, sir; only a brush.

Q. Did you see any cottonwood tree there in that locality?

(Objection as leading.)

A. Not on that side.

Q. Where did you see a cottonwood tree?

A. On the northern side there was a cottonwood tree imme-
150 diately opposite this tree that he pointed out his monument.

Q. Do you know what is called the Muleros Ford at that place?

A. No, sir.

Q. Do you know any natural object there that bears the name of Muleros Ford?

A. At that bend is the Ancon de Moleros.

Q. Is that the name by which it is generally known?

A. Yes, sir; I believe it is.

Q. Do you know a little canoncito that comes out of the mountain at point?

A. Yes, sir; on the New Mexico side.

Q. Have you heard the testimony of Judge Davis, who just left the stand?

A. Yes, sir.

Q. In what direction is this monument from the Southern Pacific Railroad bridge over the Rio Grande River?

A. It is up the river, and the general direction I suppose would be northwest; it may be more west than north; about half a mile.

Q. What do you think would be its distance in a north and south line from the Southern Pacific Railroad bridge?

A. You mean a straight line from the bridge?

Q. I mean a straight line due east and west; I want the distance between the two points in latitude?

A. I would say about four hundred varas; it is much farther west than it is north.

Cross-examination by Mr. CATRON:

Q. What is the general course of the Rio Grande above the Southern Pacific Railroad bridge for three or four miles, say up two miles?

A. It runs almost every point of the compass.

Q. I asked you the general direction?

A. How; coming down the river?

Q. You understand the general direction don't take the corners; you are a surveyor; you——

151 Mr. POPE. I object to your undertaking to score Mr. Randolph.

(No answer.)

Q. How long have you known the Rio Grande at the point where you and Escobar rode up and stopped under the cottonwood tree?

A. Well, since about 1885, I reckon.

Q. Is the river now at that point?

A. It has changed a little bit; on the Texas side Mr. Duchane in working his mine has thrown his refuse out in the channel; that has changed the current on the New Mexico side.

Q. About how far?

A. I should say 30 or 40 feet at least.

Q. Is there any old channel on the Texas side?

A. That is pretty much all channel; the last time I was there it was running next to the New Mexico side.

Q. Is that cottonwood tree still there?

A. There is a dozen of them; I did not stop under one; we stopped under cottonwood trees, and had a little house located under the trees.

Q. Did the river ever run on the east side of these cottonwood trees?

A. No.

Q. Then the cottonwood tree never was over in New Mexico?

A. No.

Q. It has always been in Texas?

A Yes.

Q. Did you speak with Escobar in Spanish?
A. No, sir; he spoke English some.
Q. He spoke very indifferently?
A. He did not speak very plainly. I was introduced to him by Mr. Hildebrand, who spoke Spanish, and a great deal of this our conversation was between these two men.
Q. But when you was under the cottonwood tree, you were with Mr. Escobar?
A. Yes, sir; no one else.
Q. And you had to get your information from him in English language?
152 A. Yes, sir.
Q. You did not pretend to speak Spanish yourself?
A. No.
Q. Do you know the parties who are pretending to claim this land?
A. By reputation; hearsay.
Q. How did you happen to be called upon to come here; who notified you first that you would have to come as a witness?
A. No one; the marshal.
Q. Nobody never spoke to you?
A. Yes; Mr. White;
Q. Who is he?
A. He is one of the owners of that brick kiln.
Q. He spoke to you on Saturday?
A. No, sir; I was summoned on Saturday, and I never saw White until Monday.
Q. Nobody ever spoke to you before what you would testify to?
A. No, sir.
Q. How did it happen that they knew of you?
A. It was generally known that I had been surveying through that country.
Q. You did not come up here to testify about a survey?
A. No, sir; not if I understand the question; no.
Q You said that it had been generally known that you had been surveying?
A. Yes, sir; I did a great deal; I am familiar with the lines and corners.
Q. Have you done any surveying on the Mexico side?
A. Yes, sir; I meandered the river on the Mexico side for E. B. Bursen and Judge B——.
Q. Where did you meander?
A. I meandered as far as the Santa Teres bridge, located on the bluff.
Q. How far below the bridge is that?
A. Eight thousand varas.
Q. Did you go down as far as Rincones?
A. No, sir; as far as this bluff.
Q. What is the general course of the river?
A. I would say sixty degrees east from that bluff.
153 Q. Do I understand you went up eight thousand varas?
A. Yes, sir; I do not remember the distance; about four or five miles.

Q. Your vara is 33 inches?
A. I think 33¼.
Q. You say that eight thousand varas is four or five miles?
A. Yes, sir.
Q. You did not go as far as four leagues, then?
A. No, sir; I did not go up to the bend in the river.

Redirect examination by Mr. POPE:

Q. Have you any interest in the land in controversy in this case?
A. None whatever.
Q. How far is this monument that Mr. Escobar pointed out to you from the river as it now runs?
A. From the river, I think it is in.
Q. How far was it from the river as then run?
A. About thirty or forty feet.
Q. And about how far from the Southern Pacific Railroad track?
A. I guess about 150 or 200 feet, or something like that, east of the track; the track runs very nearly north and south along there, a little bit west of north.
Q. Is there any great variance in the bed of the river as it now runs and as the river ran when you saw it in 1887, as revealed by your survey of eight thousand varas?
A. The changes have been tremendous; it has changed a mile since then; since I made that survey, right opposite, it has changed at least a mile.
Q. Has it changed entirely west, or both east and west?
A. Backwards and forwards; we plied on the Texas side; it was cut and then swaps back from the New Mexico side.
Q. Who did you *you had* done this work for?
A. Mr. Duchane, one of our county commissioners.
Q. His house is at this abutment.
154 A. Yes, sir; he has a stable there; his works are down below his limekiln and residence.

Recross-examination by Mr. CATRON:

Q. These distances which you have been giving are not made from actual measurement; they are mere guesswork?
A. Yes, sir; I never measured from the monument to the corner.
Q. Never measured anywheres from the objects?
A. No, sir; never did. The only measuring I did was meandering the stream, as I have said; and then I took no notes to show that the river had changed from where its bed had been; it was backwards and forwards at different points; my evidence was used in the district court.
Q. Did you have the field notes of the public survey that was made?
A. I had a map; that was the only thing that I could get.
Q. Had the river changed from the public survey above the bridge?
A. There was no change noticeable from east to west; it had changed both ways; right at the Santa Teresa Hill the river was a mile from where it had been up to the Santa Teresa Hill, and the channel changed; before the river was right against the hills; perhaps it has swapped over in the New Mexico side again; it is constantly changing.
Q. What kind of a hill is that Santa Teresa Hill?

A. It is a pure red hill; bluff, because the action of the water has made quite a face in it; it shows its red.

Q. Does the water run against it?

A. Not now; it has changed back into Texas nearly a mile.

Q. Did it run there when you first knew it?

A. No, sir; never did run against the hill since I have been there.

Q. Of your own personal knowledge you do not know when it did run there?

A. No; I could only judge by all the surveys made.

155 Mr. POPE. Q. How long did you say you were a surveyor?

A. Since '76.

Mr. CATRON. Q. You say this man White is interested in that brick-kiln business?

A. I understand so.

Q. He is the same man that spoke to you about your testimony?

A. Yes, sir; he was foreman of the grand jury in El Paso. I went up to see the marshal about my coming up. I had got the subpœna on Saturday before I went to court, and Mr. White was there, and I had a conversation with him.

Mr. POPE. I desire to introduce in evidence the plat of the preliminary survey made under the direction of the surveyor-general. (Marked "Defendant's Exhibit No. 3.")

Mr. CATRON. I object to it, because it is immaterial, incompetent, and improper under the decision of the Supreme Court of the United States.

Mr. POPE. I desire to reserve the right to put in any further documentary evidence that we think proper on the trial of the case.

Mr. CATRON. I may also have some.

The COURT. You both have that right, gentlemen.

SANTA FE, NEW MEXICO, *October 11th, 1898.*

I hereby certify that the above and foregoing twenty-two (22) pages contain a full, true, and correct transcript of all the testimony offered in open court on the taking of these depositions in the above-entitled case.

W. J. MCPHERSON,
Official Stenographer.

156 PLAINTIFF'S EXHIBIT ONE.

Quitclaim deed. Dated October 15, 1884. Consideration, $1 00. Grantor, J. M. Escobar. Grantee, Jesus Escobar. Recorded, Dona Ana County, book 6, p. 527.

Description.

"All my right, title, and interest in and unto the tract or parcel of land lying in the county of Dona Ana, Territory of New Mexico, * * * the Santa Teresa tract, situated on the west or right bank of the Rio Grande del Norte and immediately contiguous on the south side of the lands of the civil colony of Refugio, such limit being by the hill known as La Cobriene, said tract of land running ; thence down and along the right or west bank of the said Rio Grande del Norte the dis-

tance of four (4) leagues by standard Mexican league, and for the said entire length running back from said right or west bank of said river the width of one (1) such standard league, the said tract containing four (4) sitios of the sitio de ganado mayor, * * * the area of said tract, expressed in acres, being seventeen thousand (17,000) acres, more or less."

157 PLAINTIFF'S EXHIBIT TWO.

Suit 168. Santa Teresa grant.

Deed of trust. Dated: July 7, 1886. Consideration: $1.00. Grantor: J. Escobar. Grantee: George B. Simpelman. [This name is spelled a number of times in the body of the deed Zimpelman.] Recorded: Dona Ana County. Book 7, p. 372.

Deed made to secure to M. R. Pendell the payment of a promissory note for $5,000.00, payable in five years, of same date as deed.

Description.

Four sitios de ganado mayor, called Santa Teresa tract, extending from "south end of the lands of the civil colony of Refugio, such limit being the hill known as La Cabriosa," thence four leagues down the Rio Grande; and extending back from river one league.

PLAINTIFF'S EXHIBIT THREE.

Deed of trust. Dated: Oct. 16, 1884. Consideration: $1.00. Grantor: J. Escober. Grantee: J. C. Beatty. Recorded: Dona Ana County. Book 6, p. 529.

Deed made to secure to George Baggs, of Chamberino, Dona Ana County, New Mexico, the payment of two notes of one thousand dollars ($1,000.00) each, dated Oct. 16, 1884, and due, respectively, on or before April 17, 1886, and April 16, 1886.

Description.

The Santa Teresa tract.

158 PLAINTIFF'S EXHIBIT FOUR.

Joseph F. Bonham, special master, to M. R. Pendell. Master's deed. Book 17 of deeds, p. 138. Executed December 24, 1894.

Recites decree of third judicial district court, dated Aug. 7, 1894, in case of M. R. Pendell, complainant, and George B. Simpelman, Romulo Escobar, Numa Escobar, Esperanza Escobar, Julieta Escobar de Acosta, and Luis Acosta, and Adelina Zerman de Escobar, defendants, whereby last six defendants ordered to pay into court $7,385, with interest at 12% per annum from June 26, 1894, and also attorney's fee of $738.50—default made; recites sale on December 24, 1894; struck off to M. R. Pendell for $8,883.40.

Said special master transfers a certain tract of land containing 4 sitios; being private land claim 111; being same land mentioned in the deed of trust in book 7 of deeds, pp. 373–4–5.

Acknowledged before W. E. Baker, notary public, Dona Ana County, on December 24, 1894. Recorded Dec. 24, 1894.

159 PLAINTIFF'S EXHIBIT TWELVE.

In the matter of the private land claim of Jesus Escobar and others, pending before the surveyor-general of the Territory of New Mexico.

The testimony of Clemente Nañes and Maximo Castañeda, taken before the undersigned, John S. Crouch, clerk of the United States district court for the third judicial district of the Territory of New Mexico.

The said claimants being present by their attorney, Wm. T. Jones, esq., taken at the office of said clerk, at the Mesilla, on the 28th day of June, in the year one thousand eight hundred and seventy-seven.

CLEMENTE NAÑES, being first duly sworn according to law to depose the truth, the whole truth, and nothing but the truth in the above-entitled matter, says:

My name is Clemente Nañes. I am forty-five years old. I live in Chamberino, in the county of Doña Ana, in the Territory of New Mexico, being about eighteen or twenty miles from the line between New Mexico and the State of Chihuahua, on the Rio Grande River. I did not know Francisco Garcia in his lifetime, but did know his son Jose Ma. Garcia and all the other children of said Francisco Garcia. I was raised in the house of Jose Ma. Garcia from the time I was nine years of age. I am acquainted with the tract of land known as the Santa Teresa Ranch. It is situated on the west bank of the Rio Grande, a short distance north of the line of Chihuahua, in the county of Doña Ana aforesaid, and is four
160 leagues long from north to south, and one league from the river west, being four square leagues. I have known this property ever since I had knowledge of anything. During all of that time since I have known it—about thirty-seven years—it has been occupied by the heirs and children of Francisco Garcia and his wife, especially by his son Jose Ma. Garcia, by pasturing and keeping all kinds of animals on it, and also by cultivating portions of it; also they had upon it houses, corrals, and other improvements which they and their servants occupied all the time since the year 1840 up to a year or two since, when Jose Ma. Garcia sold the said property to Messrs. Escobar, and delivered the same to them or their agents, who still occupy the same. This property I have always understood was a grant of land made by the Mexican Government made to the deceased Francisco Garcia. I know that the original grant papers thereof were in the possession of Jose Ma. Garcia, his son, about the time the American troops took possession of the town of El Paso, and that it was said, after they had gone, that they had destroyed the original papers of the said grant. This was in the year 1846–47, and I learned while in the house of Jose Ma. Garcia that some time after 1850 he had applied to the authorities to perpetuate the evidence of the said grant; and I know

that either in the years of 1851, 1852, or 1853, I don't remember which, the judge at El Paso took witnesses and went onto the said land and established the boundaries itself, and again put Jose Ma. Garcia, as representative of the heirs of Francisco Garcia, in possession (juridicial) of the same.

Jose Ma. Garcia died about two years ago and Francisco Garcia, his
161 father, died about forty years ago. The exact time I can not now remember; it may have been more and it may have been less than that. I know that ever since I can remember that said tract of land known as "Santa Teresa Ranch" has always been known, recognized, and respected as the property of the heirs of said Francisco Garcia by everybody, and that the said heirs of said Francisco Garcia have at all times during the last thirty-seven years up to four or five year since, when they sold to the Escobars, held, possessed, cultivated, pastured, managed, and controlled said property as belonging to them by inheritance from their said father; said property is composed of hills and vallies [valleys], but there is no mineral or coal thereon; only a small portion is irrigable.

(Signed) CLEMENTE × (his mark) NAÑES.

MAXIMO CASTAÑEDA, being first duly sworn according to law to depose the truth, the whole truth, and nothing but the truth in the above-entitled matter, says: My name is Maximo Castañeda. I am forty-eight years of age. I now live in Las Cruces, New Mexico. I was born in El Paso, Mexico, and lived there for thirty-nine years. I did not personally know the deceased, Francisco Garcia, but did know his wife and all his children. He died before I was born, or when I was quite young. I know the property known as the ranch of Santa Teresa. It is situated in the county of Doña Ana, New Mexico, on the west bank of the Rio Grande River, a little to the north of the line of Mexico. I do not know the extent of the said ranch nor the exact specific boundaries, but I
162 have always understood and the same has always been considered and respected by everyone as the property of the deceased, Francisco Garcia, and his heirs, under a grant from the Spanish Government. The same has at all times been respected by everyone as the property of Francisco Garcia and his heirs, and I know that ever since I have had knowledge of anything the heirs of said Francisco Garcia have occupied and held said ranch as their property under a claim of title to the same by virtue of a grant from the Spanish authorities in Mexico, up to a few years when they sold to the Messrs. Escobar, who have since then occupied it, and I further state that during my recollection there has never been any interruption in the possession of the said ranch by the said heirs of the said Garcia up to the time they sold and delivered the same to the said Escobars. To my knowledge the said lands contain no mineral or coal.

(Signed) MAXIMO CASTAÑEDA.

I, John S. Crouch, clerk of the United States district court in and for the third judicial district of the Territory of New Mexico, do hereby certify that the foregoing witnesses, Clemente Nañes and Maximo Castañeda, in accordance with the accompanying commission to me directed,

were caused to come before me and were first duly sworn in the manner required by law, and in accordance with the usual rules of this court gave their evidence and deposed in the manner aforesaid, and gave their evidence in the words aforesaid as subscribed and signed by them, and the same was at the time by me reduced to writing and signed by them in my presence, and the same contains all of the evidence given in
163 said matter by them and each one of them before me as aforesaid.

Witness my hand and the seal of the said district court at Mesilla, New Mexico, this 28th day of June, A. D. 1877.

[SEAL.] (Signed) JOHN S. CROUCH,
Clerk U. S. District Court in and for the Third Judicial District of the Territory of New Mexico.

164 H. M. Atkinson,
Surveyor-General.

David J. Miller,
Translator and Chief Clerk.

UNITED STATES SURVEYOR-GENERAL'S OFFICE,
Santa Fe, New Mexico, June 7, 1877.

To J. S. CROUCH, Esq.,
Clerk U. S. District Court in and for the 3d Judicial District of the Territory of New Mexico.

Whereas on the 4th day of June, 1877, Jesus Escobar, for himself and others, claiming to be heirs and assignees of the interest of one Francisco Garcia, deceased, in what is known as the Santa Teresa tract in Doña Ana County, Territory of New Mexico, filed a petition with certain accompanying title papers in this office, under the provisions of the eighth section of the act of Congress approved July 22nd, 1854, entitled "An act to establish the offices of surveyor-general of New Mexico, Kansas, and Nebraska, to grant donations to actual settlers therein and for other purposes," claiming title thereto, and praying that the title of petitioners to said tract may be investigated in accordance with the act of Congress aforesaid.

And whereas the location of said tract and the residences of witnesses are some 300 miles distant from Santa Fe, which I deem a sufficient reason for authorizing the taking of testimony before some officer qualified therefor, who may reside in the locality of said tract claimed by petitioners. Now, therefore, I, Henry M. Atkinson, surveyor-general of the Territory of New Mexico, do hereby designate and authorize you, John S. Crouch, clerk of the United States district court, in and for the third judicial district of the Territory of New Mexico, to take such testimony in this case as may be offered from time to time under the usual rules of your court for such purposes, and upon the completion of the testimony of any one witness or witnesses you will sign, seal, and transmit the same under seal to this office, the compensation for which you will look to the parties in interest, the petitioners, or the witnesses in the case.

Given under my hand the day and year last above written.

H. M. ATKINSON,
Surveyor-General.

165 PLAINTIFF'S EXHIBIT THIRTEEN.

OFFICE OF THE U. S. COMMERCIAL AGENT
OF THE UNITED STATES,
At Paso del Norte, Mexico, November 23rd, 1878.

I, Solomon Shutz, commercial agent of the United States at Paso del Norte, Mexico, under and by virtue of a certain commission hereto attached, and dated United States surveyor-general's office, Santa Fe, New Mexico, November 8th, 1878, and directed to me as American consul at Paso del Norte, Mexico, by Henry M. Atkinson, surveyor-general, do certify that Feliz Lerma was presented before me as a witness with reference to the data accompanying this commission marked "Santa Teresa Tract, E. & A. File, 115," who, being first duly sworn by me, testifies as follows:

My name is Feliz Lerma. I am sixty-six years of age. I am acquainted with the Santa Teresa tract of land. It is situated in the county of Doña Ana, Territory of New Mexico. I was secretary of the second justice of the first instance at Paso del Norte, Mexico, in January, 1853, and following.

Question. Examine paper marked "Santa Teresa tract E & A, file 115," and state if you have ever seen it before, and all you know about it.

Answer. I have seen it; it is in my handwriting. I wrote it in the year 1853 at the date specified therein. My name is signed by me to the same. I have compared the said document with the original on file in the office of the second justice of the first instance at Paso del Norte, Mexico, on this date, as well as on the same date specified in said document. The same is a true and faithful copy of the said original in said office, which is also in my handwriting. I was also present at the taking of the
166 testimony of the witnesses mentioned in said document and they swore to the same facts mentioned in said document, and that their testimony was taken down in writing by me at the same time exactly as expressed in said document, and that the said order of the said justice was given and act of possession made to my certain and personal knowledge as stated and set forth in said document. Bentura Lopez was at the time said document was made the second justice of the first instance at Paso del Norte, Mexico, and had the custody and control of the originals from which said document was taken. I am acquainted with his signature and the same affixed to said document is genuine and was subscribed by him to the same in my presence.

FELIX LERMA. [Rubric.]

FRANCISCO BARRON, being first duly sworn, says: My name is Francisco Barron; I reside in Paso del Norte, Mexico; I am forty-eight years of age; in the year 1853, during the whole of the year, I was clerk of the second justice of the first instance at Paso del Norte, Mexico. Bentura Lopez was the justice thereof.

Question. Examine document shown you, marked "Santa Teresa tract, E. & A. file, 115," and state if you have ever seen it before and all you know about it.

Answer. I have examined it. I saw it before in the year 1853 when the same was made. It is a copy of the original record thereof in the office of the second justice of the first instance of Paso del Norte, Mexico. I, at the time the same was made, compared it with the original,

and this day I have again compared it with the original thereof, which is a part of the records and archives of the second justice of the first
167 instance at Paso del Norte aforesaid. The same is a true and correct copy of the said original record in said office of the said second justice of the first instance. The signature of Bentura Lopez to the same is his genuine signature, and was signed thereto in my presence. I have often seen him write and am well acquainted with his signature. I signed the same document with Bentura Lopez and Feliz Lerma. My signature thereto is genuine, as also is that of Feliz Lerma, who also signed the same in my presence. I also know that the evidence set out in said evidence was taken by said justice as stated in said document, the same being done in my presence; as also do I know that the decree and act of possession were given and made as therein stated. Romulo Varela is now the second justice of the first instance at Paso del Norte, Mexico, and has the charge and custody of the original record from which said document has been copied.

F. BARRON. [Rubric.]

ROMULO E. VARELA, being first by me duly sworn, testified as follows: My name is Romulo E. Varela; I am twenty-five years of age and reside at El Paso, Mexico; I am second justice of the first instance at Paso del Norte, Mexico.

Question. Examine paper shown you, marked "Santa Teresa tract, E. & A. file, 115," and state if you have ever seen and what you know about it.

I have seen it for the first time this day. It is a correct copy of the original record thereof in my office as said justice. I have compared it with the said original record this day and find the same to be an
168 exact and faithful copy in every respect. I am the official custodian of the said original records and as said justice have the same in my care and charge. Said original record is a part of the public archives and records belonging to my said office. The signatures of Francisco Barron, Feliz Lerma, and Ventura Lopez attached to said document shown me I know to be their genuine signatures.

ROMULO E. VARELA. [Rubric.]

And I do hereby certify that each and every one of the above-named witnesses appeared before me in person and under oath testified as aforesaid, and that the foregoing statements signed by them contain all of the evidence given by them with reference to the document aforesaid.

Given under my hand and seal of office this 23rd day of November, A. D. 1878, at Paso del Norte, Mexico.

[SEAL.]

SOLOMON SCHUTZ,
Comm. Agent of the U. S. at Paso del Norte, Mex.

169 [Stamp.]

C. Romulo E. Varela, alcalde 2° y Jues de 1a Ynstancia del Canton Bravos, estado de Chihuahua, Mexico.

Certifico que las antecedentes cuatro fojas, y ocho paginas de esta escritura é informacion y acta de posesion ad perpetuam de la merced de Santa Tereza es una copia verdadera y correcta de su original protocolo o espediente correspondiente al año de 1853 que existe en este oficina de

mi cargo, cuya copia he confrontado hoy mismo con su original y la encuentro correcta y verdadera, con la que existe en el archivo de este juzgado que hoy es a mi cargo. Y a pedimento y solicitud del interezado Lic. T. B. Catron, procurador-general de los E. U. del Norte, y a presencia del agente comercial de la misma nacion en Franklin, Salomon Schutz, y testigos de asistencia estiendo el presente hoy dia de la fecha.

Paso del Norte, Mexico, Novbe. 23rd de 1878.

ROMULO E. VARELA. [Rubrica.]

A.

PEDRO TELLEZ. [Rubrica.]

A.

JESUS TALLEZ. [Rubrica.]

TRANSLATION OF THE ABOVE.

[Stamp.]

Citizen Romulo E. Varela, 2 alcalde and judge of the first instance of the Canton Bravos, State of Chihuahua, Mexico.

I certify that the foregoing four leaves and eight pages of this writing and information and act of possession, ad perpetuam of the Santa Tereza grant, is a true and correct copy of its original protocolo or expe-
170 diente corresponding to the year 1853 which exists in this office under my charge, which copy I have this day compared with the original and I find it true and correct, with that which exists in the archives of this judicial tribunal, which is this day under my charge. And at the request and solicitation of the interested party, Lawyer T. B. Catron, attorney-general of the United States of the North, and in the presence of the commercial agent of the same nation in Franklin, Solomon Schutz, and attending witnesses I issue the present, this the day of its date.

Paso del Norte, Mexico, Nov. 23, 1878.

ROMULO E. VARELA. [Rubric.]

A.

PEDRO TALLEZ. [Rubric.]

A.

JESUS TALLEZ. [Rubric.]

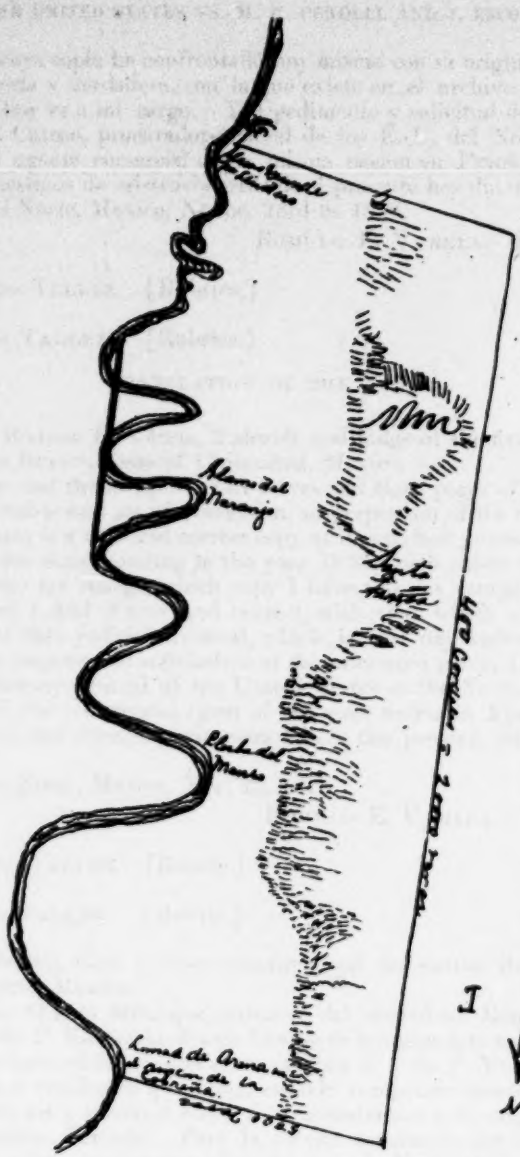
Jesus Padilla, Gefe politico constitucional del canton Bravos Estado de Chihuahua, Mexico.

Certifico: Que la firma que antecede del ciudadano Romulo Varela, Juez 2° y de 1ª Ynstancia de este Canton es la misma que usa y acostumbra en sus actos oficiales: que el es el Juez 2° y de 1ª Ynstancia como aparece en el certificado que firma, estando competentemente autorizado para hacerlo asi y siendo él quien tiene actualmente a su cargo los archivos del misma Juzgado. Para la debida constancia doy este en Paso del Norte a las veinte y tres dias del mes de Noviembre de mil ocho cientos setenta y ocho.

JESUS PADILLA. [Rubrica.]

RAFAEL BARRON. [Seal of the Gefe Politico.]
Secretario.

Ten cents Mexican revenue stamps, cancelled.



Plaintiffs Exhibit Number.

No. 211
U.S. vs. Cuba
Filed
p. 173

171 TRANSLATION OF THE FOREGOING.

JESUS PADILLA,
Constitutional Political Chief of Canton Bravos,
State of Chihuahua, Mexico:

I certify that the foregoing signature of the citizen Romulo Varela, second judge and of the first instance of this canton, is the same which he uses and is accustomed to use in his official acts. That he is the second judge and judge of the first instance, as appears in the certificate which he signs, he being competently authorized to do the same and he being the one who has actually in his charge the archives of the said judicial tribunal. And in order that the same may have force I give this in Paso del Norte on the 23rd day of the month of November, 1878.

JESUS PADILLA. [Rubric.]

RAFAEL BARRON, [Seal of the political chief.]
Secretary.

Ten cents Mexican stamps, cancelled.

COMMERCIAL AGENCY OF THE UNITED STATES,
At Paso del Norte, Mexico, Novb. 23, 1878.

I, Solomon Schutz, commercial agent of the United States at Paso del Norte, Mexico, do hereby certify that I am well acquainted with the signature of Romulo E. Varela and Jesus Padilla. That I have often seen them write. That their respective signatures attached to the foregoing certificates are genuine. I further certify that Romulo E. Varela is the second justice of the first instance at Paso del Norte, Mexico, and is exercising the duties of said office at this date. I further certify that I in person compared the document annexed hereto, marked "Santa
172 Teresa Tract Ex. A File 115." with the original record thereof, which said original was shown by said Romulo E. Varela as the said justice in his office as such, and that the said original is a part of the public records in his said office, and that the copy attached hereto is a true, correct, and perfect copy of the said original. I further certify that I know Jesus Padilla personally and that his signature attached to the foregoing certificate signed by him is genuine, and that he is the constitutional political chief of the Canton Bravos, in the State of Chihuahua, Mexico, in which said canton the said Paso del Norte is situated. I further certify that the seal attached to said certificate, signed by said Jesus Padilla, is the genuine seal of office of said political chief, and that the said political chief is the highest civil officer in said canton.

Witness my hand and seal of office at Paso del Norte this the day and year above written.

SOLOMON SCHUTZ,
Commercial Agent of the U. S. at Paso del Norte.

[Seal of the U. S. commercial agency, Paso del Norte, Mexico.]

(Here follows map, marked page 173.)

174 PLAINTIFF'S EXHIBIT FIFTEEN.

Santa Teresa grant.

No. 111. OPINION OF SURVEYOR-GENERAL ATKINSON.

This claim for land alleged to have been granted some time prior to 1790 comes before me for action, under the Gadsden treaty of December 30, 1853, and the 8th section of the act of Congress approved July 22, 1854, establishing this office, together with the act of Congress approved August 4th, 1854.

The grant is claimed to have been made to one Francisco Garcia, prior to 1790, by the Spanish authorities of what was then New Biscay, now the State of Chihuahua, and the original muniments of title are alleged to have been lost or destroyed during the occupation of El Paso del Norte by the United States troops in 1846, while said title papers were in the possession of Jose Maria Garcia, one of the heirs of the grantee, Francisco Garcia, who had died some years previous.

The land claimed is situate on the west bank of the Rio Grande del Norte within the limits of the present county of Doña Ana, Territory of New Mexico, and in that portion thereof embraced by the Gadsden purchase, and is known as the "Santa Teresa" tract.

On the 7th day of January, 1853, and prior to the date of the Gadsden tract, Jose Maria Garcia, son of Francisco Garcia, the grantee, and executor of the estate of his mother, the widow of Francisco Garcia, in order to perpetuate the evidence of title of his father's estate to said grant, made application to the proper judicial authorities at El Paso del Norte for that purpose, which application and proof submitted
175 appears to have been done in accordance with the laws and customs of the State of Chihuahua, within the limits and jurisdiction of which the land in question was situate.

In pursuance of such application, and upon the evidence of several witnesses, testifying to the previous existence of the grant to Francisco Garcia for the tract claimed, the loss of the title papers during the American occupation of El Paso del Norte in 1846, and the occupancy of the land by the grantee and his heirs, the second civil justice of the cantonsment of Bravos, Bentura Lopez, rendered a decree, declaring the property to belong to Jose Maria Garcia and his coheirs, under and by virtue of the grant to Francisco Garcia, their father. In accordance with the order of the said justice, the applicant, Jose Maria Garcia, for himself and the other heirs of Francisco Garcia, was on the 16th day of January, 1853, placed in possession of the tract by the justice, who from the testimony of accompanying witnesses as to the location of the old boundaries and monuments, redesignated and marked the boundaries of the tract as follows, to wit: Being at the bend of the Piedras Paradas there was measured a cordel of fifty varas of the commercial vara and was shown as the old boundary by the party interested and the practical Alejo Martinez, a thick cottonwood on the margin of the river, from which has been cut purposely some parts of the bark from around it, and from this point, proceeding above from south to north, there was measured four hundred cordels (400) of fifty varas, bounded on the east side by the Rio Bravo, the measure reaching to a cottonwood standing

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on the bank of the river near some sand hills with three or four palmetto plants which are found in the bend of the Cobroña, which
176 cottonwood was marked as a boundary by taking from it the bark until penetrating to the center of the wood. From this point the measurement turned from east to west on the north side, and there was measured one hundred (100) cordels of fifty varas, which reached above the brow (ceja) to a small forest of ojasin, at which point was placed as landmark a pile of stones; turning the measure from north to south on the west side there was measured four hundred cordels over the hills and near the brow (ceja) and they reached to a depression of the hills and the brow (ceja), where there was placed as a landmark a mound of earth; and turning the measurement from west to east in direction to the river, there was measured (100) one hundred cordels of fifty varas, encountering the thick cottonwood which remained marked as the first landmark.

The transcript of the proceedings of the court upon the application to perpetuate the evidences of title on file in this case, as the basis of the claim, is duly authenticated, as required by the laws of the United States relative to documents offered in evidence in the United States courts from foreign countries, and the decree or order of the justice, based upon the testimony of several witnesses (the credibility of three of whom is vouched for by the U. S. consul at El Paso del Norte) in regard to the loss of the grant papers, occupancy of the land by the grantee and his heirs, declaring the property to belong to the heirs of Francisco Garcia, was evidently proper and justified by the evidence before him, and this certified transcript, together with the official certificate of Mariano Samanieyo, political chief in 1873, sufficiently established the validity of the grant, taken in connection with the other evidence in the case, without
177 other or further proof; but there is corrobrative evidence of the genuineness of this grant on file in this office, as in the case of the Refugio Colony grant, made in 1852, reported number ninety. The south boundary call of the latter is stated to be "the lands of Jose Maria Garcia," or the lands covered by the claim under investigation.

The evidence of occupation of the tract by Francisco Garcia, and after his death by his widow and his heirs, for a continuous period from prior to or about the year 1790 until recently, raises a strong presumption in favor of the validity of the grant, independent of the documentary evidence referred to, and it is believed to be a good and valid grant. The claim is therefore approved to the heirs and legal representatives of Francisco Garcia and their assigns, according to the boundaries as herein set forth and as described in the resurvey or act of possession of January 16th, 1853, executed at El Paso del Norte by Bentura Lopez, second justice and of 1st instance of the cantonsment of Bravos.

Triplicate copies of all the papers in the case, duly authenticated, will be forwarded for the action of Congress in the premises.

HENRY M. ATKINSON,
Surveyor-General.

SURVEYOR-GENERAL'S OFFICE,
Santa Fe, New Mexico, December 11th, 1878.

(Here follows map marked p. 178.)

179 DEFENDANT'S EXHIBIT A.

To the Hon. H. M. ATKINSON,
U. S. Surveyor-General for New Mexico:

Your petitioners, Jesus Escobar, Jesus Ma. Escobar, and other heirs of Francisco Garcia, deceased, respectfully represent, that prior to the year 1790 the Spanish authorities in the present State of Chihuahua, then New Biscay, in Mexico, made to one Francisco Garcia, since deceased, a grant of a tract of land lying and being situated on the west bank of the Rio Grande del Norte, in the limits of the present county of Dona Ana, New Mexico, and in that portion thereof known as the Gadsden purchase, said tract of land being known as "Santa Teresa, and situated a little above the northern line of the present State of Chihuahua, and contains four square leagues of land, more or less, extending from a point where a large cottonwood tree formerly stood, up and along the river 2,000 varas to a place where another cottonwood tree formally stood near some sand hills, said trees, as your petitioners are informd, having been carried away by the abrasion of the banks of the river, by high water; from the last-mentioned point extending to the west 5,000 varas to where a pile of stones was erected, and from thence extending in a southward direction to where a monument of dirt was erected, and from thence to the east to the place of beginning, all of which boundaries, places, and distances will more fully appear by reference to the papers herewith filed, marked "Santa Teresa Grant." "Exhibit A." That the original title papers of said grant were destroyed in the year 1846 by the American troops in El Paso, in the State of Chihuahua, where the same were kept. That in January, 1853, Jose Ma. Garcia, the son of said Francisco Garcia, and the executor of the estate of his mother, the wife of said Francisco Garcia, made application in due form of law, to the proper judicial authorities to

180 perpetuate the testimony of said grant, which was done according to the laws and customs of the State of Chihuahua, where said property was then situate, at El Paso, in said State, and in accordance therewith a decree was rendered declaring the said property to be the property of the said Jose Ma. Garcia and his coheirs, and directing that the said Jose Ma. Garcia, should go onto the ground, with the judge and some witnesses who could show the old boundaries, etc. That in accordance with said decree said judge, being the 2nd judge and judge of the 1st instance of the canton of Bravos, in company with said witnesses, on the 16th day of January, 1853, repaired to said land in accordance with said decree, and placed the said Jose Ma. Garcia in juridical possession of the same. Your petitioners further represent that the said Francisco Garcia, his heirs and their assigns have ever*n* since prior to 1790 been in the quiet, peaceable, and uninterrupted possession of the said tract of land, except for a short time when the Indians drove every one away from the same; that since the 16th day of January, 1853, there has been no interruption whatever in the quiet and peaceable possession of said petitioners and those under whom they hold. Your petitioners, Jesus Escobar and Jesus Ma. Escobar, further show that while they are not heirs of said Francisco Garcia, deceased, they have purchased the greater portion of the interests in said grant and tract of land

from the heirs of said Francisco Garcia; that a small portion thereof is still owned by some of said heirs in whose behalf this petition is made, as well as that of said Jesus and Jesus Ma. Escobar.

Your petitioners also, as evidence of their said title, refer to the colonial grant of Refugio, No. 90, on file in the surveyor-general's office, which refers to the property in question as the property of Jose Ma.
181 Garcia, being the southern line of said Refugio grant; also they refer to the certificate of the U. S. consul at El Paso, filed herewith, marked "Ex. B," and of Mariano Samaniego, political chief of the district of Bravos, in Mexico, filed herewith, marked "Ex. C," as corroborative evidence.

Your petitioners pray that their said title may be inquired into in accordance with the act of Congress approved July 22, 1854, and the said property decided to be the property of the heirs and assigns of Francisco Garcia, deceased, and that if found a bona fide grant the same may be confirmed and patented to your petitioners.

JESUS ESCOBAR,
For himself and the other owners of said grant.

GILDERSLEEVE & ELLISON, *Attys.*

182 DEFENDANT'S EXHIBIT B.

[Document A.]

GOBIERNO DEL ESTADO DE CHIHUAHUA. SECRETARIA DE ESTADO.

En la representacion que VV. han dirijido a este Gobierno pidiendo se les repartan los terrenos que en ella misma se indican, se ha puesto con esta fecha el siguiente decreto:

"Pase esta solicitud al Sor. Cura Dn. Ramon Ortiz, comicionado para las nuevas poblaciones del canton Bravos, a fin de que realize los laudables proyectos de los que la suscriben y recompenze equitativamente los trabajos que han impedido conforme al Reglamento de 24 de Mayo ultimo publicado en el numo. 51 del correo y en cuanto lo permita la ley espedida por el H. Congreso del Estado en 13 de Marzo ultimo, su relativa de 11 de Abril de 1850 y las providencias dictadas para proveer provisionalmte. de egidos a la Villa del Paso y a sus pueblos inmediatos.

"Comuniquese este decreto a los interesados."

Y lo transcribe a VV. para su conocimiento.

Dios y L. Chihuahua, Junio 1 de 1851.

AMADO DE LA VEGA. [Rubrica.]

Sor. Dn. Jose Ma. Garcia y demas vecinos que suscriben la representn. espresada. Paso.

183 [Document B.]

En la colonia civil del Refugio, a los veinte dias del mes de Febrero de mil ochocientos cincuenta y dos. El Ciudadano Ramon Ortiz, Cura propio del Paso del Norte, perteneciente a la Republica de Mejico y Comisionado general nombrado por el alto Govierno de la Union Mejicana, para fundar y establecer colonias civiles en el Estado de Chihuahua

segun las reglas legales dadas al efecto y las que se hayan vigentes en nuestros codigos de legislacion: Teniendo presentes las facultades con que al intento me hayo investido, por la ley general organica fecha dies y nuebe de Agosto de mil ochocientos cuarenta y ocho, y el reglamento derivativo de veinte y dos de Mayo de mil ochocientos cincuenta y uno. Estando ya establecida y notablemente aumentada esta colonia, asi como practicado el repartimiento de suertes de tierra y solares de casas entre sus moradores, previa la designacion de locales para casas consistoriales iglesia, etc., y la mercenacion de ocho suertes de tierra, para los fondos de propios, debia proceder, y en efecto procedo a hacer el señalamiento de egidos que le corresponden a dicha poblacion, y siendo que conforme a lo dispuesto, en los articulos veinte y cuatro y veinte y cinco del decreto del dies y seis de Noviembre de mil setecientos ochenta y seis, el egido es el campo que esta a la salida de las ciudades, pueblos y lugares, y que no se cultiva ni siembra. Designo por consiguiente a la nominada colonia del Refugio una legua y un cuarto, para sus egidos, cuya medida que es la senalada por el arto. veintitres de la ley del estado de veintitres de Diciembre de mil ochocientos cincuenta y uno para las poblaciones que poseen mas de mil almas. Se tiro y destribullo en seguida de los ultimos terminos de la propiedad, o poseciones ya repartidas, siguiendo en ello la disposicion y la configuracion cuadrilatera que tienen los terrenos divididos,
184 en cista de no haber podido ser cuadrado perfecto, sobre lo cual conviene tener presente que la labor de la citada colonia del Refugio, tiene de longitud seis mil novecientas varas de norte a sur y dos mil cuatrocientas setenta y cinco varas de oriente a poniente, y por consiguiente una superficie de dies y sieste millones ochenta y siete mil quinientas varas cuadradas. Conocida la figura y terminos del terreno, y tomando en consideracion que hacia el lado del rio no queda bastante tierra baldia para señalar el egido pr. ese rumbo, se añaden las tres mil ciento veinticinco varas que debian medirse en esta parte, sobre el numero semejante que se establece en la parte norte, esto es, midiendo seis mil doscientas cincuenta varas desde la tierra de Dn. Jose de la Luz Jaquez, o mas claro, desde el punto correspondiente en una linea recta de esta tierra que corre de oriente a poniente, y de ayi siguiendo la lateral del rio seran las seis mil docientas cincuenta varas, en cuyo punto final se levantara la respectiva mohonera, en seguida desde el limite de la tierra de Jose Marquez que esta situada en la orilla de las lomas hacia el poniente de las lomas se mediran tres mil ciento veinticinco varas, y otras tantas pr. la parte del sur desde el limite de Dn. Jose Maria Garcia, donde se plantaran tambien las respectivas mohoneras. Por ultimo, para montes y pascos comunes de que habla la cedula de catorse de Mayo de mil ochocientos cuatro, y reglamento antes citado de veintidos de Mayo de mil ochocientos cincuenta y uno, señale todo el bosque y faja de terreno que media, entre la labor y el rio, desde el principio y fin de esta, hasta toda su longitud, del mismo modo señalo para prado y dehesa comun, las faldas y caidas adyacentes de las lomas situadas al poniente en una estencion longitudinal siguiendo el curso de su cordillera igual a la dehesa comun marcada pr. el lado del rio. El derecho de pastos y demas
185 conseciones que al presente otorgo a fabor de esta nueva poblacion en nombre del Govierno Federal y del Estado de Chihuahua es perpetuo e inprescriptible, fundado en el consentimiento de las autori-

dades supremas, y en la letra de la antigua y moderna legislacion. En vista de todo esto, queda desde hoy el precitado Pueblo del Refugio, en la mas amplia posecion del fundo que pr. derecho le corresponde bajo la restriccion de no poder enagenarlo en manera alguna, a iglesia, monasterio, persona eclesiastica, comunidad o cualquiera otra de las que llaman manos muertas, por prohivirlo las leyes. Y para la constancia y validacion y autenticidad que haver conviene estiendo el presente titulo que queda inscrito en el protocolo de registros de la municipalidad, legitimando el libre use y aprovechamiento de los terrenos que se le han concedido. En fe de lo cual lo firmo en el pueblo y fecha citada. Ramon Ortiz, E. R. Ciento. Vale. Lo tachado no vale.

Es copia fiel y legalmente sacada de su original a que me remito.
Colonia del Refugio, Agosto 19 de 1852.

[Stamp.] RAMON ORTIZ. [Rubrica.]

C Dor. Mariano Samaniego, Gefe Politico del Distrito Bravos, Estado de Chihuahua, Mejico, Certifica:

1o. Que el Senor Cura D. Ramon Ortiz fue comicionado legitimo del Gobierno General de Mejico para estableser las colonias civiles "el Refugio" y otras pertenecientes hoy a los Estados Unidos.

2o. Que la firma que antesede es la que el Senor Ortiz ha usado y usa en todos sus negocios, considerando por consiguiente legal el documento anterior.

Da el presente a solicitud de los CC. Jose Ma. Garica, Pedro
186 Telles y Simon Henriquez para los usos que los convenga.
Paso del Norte, Sebre. 11 de 1871.

MO. SAMANIEGO. [Rubrica.]
L. VELARDE, *L. Y.* [Rubrica.]

U. S. CONSULATE AT EL PASO DEL NORTE, MEXICO.

I, Edwin Lyon, consul for the United States of America, do hereby certify that the above signature of M. Samaniego is genuine.

Witness my hand and official seal this 11th day of Sept., 1871.

[SEAL.] EDWIN LYON, *Consul.*

187 [Document C.]

C. Gefe Politico del Distrito Bravos.

La comicion especial que ocurrio anto V. hace poco tiempo, pidiendo copias autenticas de los documentos de egidos o area del Pueblo del Refugio (hoy de los E. U. del Norte) para legalizar al efecto el justo derecho de su propiedad reconocida y agraciada por las autoridades legitimas de Mejico, cuando aquel pueblo correspondia al distrito del digno cargo de esta Gefatura (Mexico), hoy se presenta de nuevo, suplicando a V. se sirva no tomarse la molestia de espedirle las repetidas copias, ni por su conducto, ni por el del Supremo Gobierno del Estado de Chihuahua, por haber agenciado ya, aquellos credenciales, de un comicionado, en cuyo poder existian en dicho Territorio de N. M. Estados Unidos.

Damos a V. pues, Sr. las mas esplicitas gracias, por la deferencia con que se ha dignado acojar nuestras molestias, y solo le suplicamos, se digne certificar la firma del Sr. Cura D. Ramon Ortiz, comicionado que fue por el

Gobierno de Mexico, para espedir dicho documento. Le suplicamos ademas que el Vice-Consul Mexicano, haga el propio reconocimiento de las referidas firmas que se ven en los documentos adjuntos y despues, que se nos devuelvan para los usos de nuestros derechos.

Este es el paso que creemos propio en el presente asunto, ofreciendonos a las ordenes de V. sus ob ltes. S. S.

Villa del Paso, Mexico, Sete. 10 de 1871.

JOSE MA. GARCIA. [Rubrica.]
SIMON ENRIQUES. [Rubrica.]
PEDRO TELLES. [Rubrica.]

188 [Document D.]

[Stamp.]

Por conducto de la Sria. del Supremo Gobno. de este Estado de Chihuahua (Mejico), se dice a esta Gefa. en superior orden de fha. 14 de Junio pasado, lo que a la letra copio.

"Al margen de la instancia que ha presentado a esa Gefa. de Distrito, la comicion especial de la Colonia del Refugio (E. U.) en pretencion de los documentos legales que acrediten la area de sus ejidos y que V. me acompaña con su nota No. 61, fha. de Mayo pmo. pasado, el C. Gobor. del Estado se ha servido decretar hoy lo siguiente:

"Busquese en el archivo, los documentos que se citan para que se espida la copia que piden, y en caso de no incontrarse, resolver lo conveniente. Comuniquese el tramite a los interesados, por conducto de la Gefa. Politica del Distrito de Bravos. Terrazas. Delhumean. Oficial lo." Y tengo el honor de trascribirlo a V. de superior orden para los fines que indica el espresado superior decreto."

Lo trascribo a VV. para su conocimiento, repitiendoles las consideraciones justas de mi aprecio y (cons.).

Yndepa. y Lib. Paso Sbre. 4 de 1871.

MO. SAMANIEGO. [Rubrica.]
F. BARRON, *Srio.* [Rubrica.]

C. C. Simon Enriquez, Jose Ma. Garcia y Socios. [Rubrica.] Refugio E. U.

189 DEFENDANT'S EXHIBIT BB.

Docs. "A," "B," "C," "D." Title under grant and commons of the Colony of Refugia (now Union), precinct No. 7 of the county of Dona Ana, Territory of New Mexico.

Certificate of the political authority of El Paso, Mexico, to the signature of Commissioner Ortiz.

Authorization of the United States consul in Mexico, and other relative documents.

190 GOVERNMENT OF THE STATE OF CHIHUAHUA,
OFFICE OF STATE.

Upon the petition which you have directed to this Government, asking that the lands therein indicated be distributed to you, the following decree has this day been made:

"This petition will be referred to Curate Ramon Ortiz, commissioner for the new settlements of the district of Bravos, to the end that he real-

i
ze the laudable purposes of those who have signed the same, and equitably reward the labors they have commenced, according to the regulations of the 24th of May last, published in No. 51 of El Correo, as far as is permitted by the law enacted by the honorable congress of the State on the 13th of March last, that on the same subject of the 11th of April, 1850, and the provisions dictated to provide provisionally commons for the town of El Paso and adjoining towns.

"Let this decree be communicated to the parties interested."

And I communicate the same to you for your information.

God and liberty.

Chihuahua, June 4, 1851.

AMADO DE LA VEGA.

Jose Maria Garcia, esq., and other citizens who signed the said petition.

In the civil colony of Refugio, on the 20th day of the month of February, 1852, I, citizen Ramon Ortiz, permanent curate of Paso del Norte, appertaining to the Republic of Mexico, general commissioner, appointed by the high government of the Mexican Union to found and establish civil colonies in the State of Chihuahua, according to the legal regulations issued for that purpose, and those in force in our legislative codes, in view of the powers with which I am vested in the premises by the general
191 organic law, dated August 19, 1848, and the derivative regulation of May 22, 1861, this colony being already established and greatly increased, and also the distribution of suertes of lands and resident lots among its settlers having been effected, after the designation of localities for town houses, churches, etc., and the granting of eight suertes of land for corporation funds, should proceed, and did in fact proceed, to execute the assignment of commons to which said settlement is entitled; and as, according to what is set forth in the twenty-fourth and twenty-fifth articles of the decree of November 16, 1786, the egido (common) is the land lying on the suburbs of cities, towns, and places which are not cultivated nor planted, I therefore designate to the aforesaid colony of Refugio one league and a quarter for its commons, the measurement of which being that prescribed by the twenty-third article of the State law, of December 23, 1851, for the benefit of settlements containing over one thousand souls, was then commenced and assigned from the exterior of the outer limits of the property or possession already distributed, observing the character and the quadrilateral configuration of the lands distributed, inasmuch as it could not be made into a perfect square. It must be borne in mind that the arable land of the colony of Refugio has in length six thousand nine hundred varas from north to south, and two thousand four hundred and seventy-five varas from east to west, and consequently an area of seventeen millions eighty-seven thousand five hundred square varas. The figure and the limits of the tract being known, and taking into consideration that toward the river side there is not sufficient public land to mark out the common on that side, the three thousand one hundred and twenty-five varas that ought to have been measured on that side are added to a like number on the northern side; that is to
192 say, measuring six thousand two hundred and fifty varas from the lands of Jose de la Luz Jaquez, or, more plainly, from the point corresponding on a direct line of this land, running from east to west,

thence following the side of the river will make the six thousand two hundred and fifty varas, at which final point the proper landmarks will be raised, after which, from the limits of the lands of Jose Marquez, which is situated at the edge of the hills towards the west, there will be measured three thousand one hundred and twenty-five varas, and as many more on the south side, from the limits of the lands of Jose Maria Garcia, where the said landmarks will also be raised.

Lastly, for woodlands and common pasturage, of which mention is made in the decree of the 14th of May, 1804, and the regulation hereinbefore cited of the 22nd of May, 1851, I designate the entire bosque and strips of land lying between the arable and the rivers, from the commencement and end of this arable land, embracing its whole length. I likewise designated for public lawn and grounds the adjacent brows and slopes of the hills situate on the west in a longitudinal extension, following the course of the summit, equal to the common pasture grounds dis'gnated on the side of the river. The right of pasture and other concessions which I hereby stipulate in favor of this new settlement, in the name of the Federal Government and of the State of Chihuahua, is perpetual and imprescriptible, founded upon the consent of the supreme authorities and on the letter of ancient and modern legislation.

In view of all which, from this day forward, the aforesaid settlement of Refugio remains in the most ample possession of the tract to which
193 it is entitled by law under the restriction that it can not alienate the same, in any manner, to any church, monastery, ecclesiastical person, community, or into any other mortmain, so called, as this is prohibited by law; and for the due testimony and validity and authenticity I issue this title, which remains recorded in the book of records of the municipality, authorizing the free use and benefit of the lands which have been granted to it.

In testimony of which I sign the same, at the town and on the date aforesaid.

RAMON ORTIZ.

A faithful and legitimate copy, taken from its original, to which I refer.

Colony of Refugio, August 19, 1852.

RAMON ORTIZ.

Dr. Mariano Samaniego, political chief of the district of Bravos, State of Chihuahua, Mexico, certifies:

1st. That Curate Ramon Ortiz was a lawful commissioner of the general Government of Mexico to establish the civil colonies of Refugio and others which now appertain to the United States.

2d. That the preceding signature is that which Mr. Ortiz has used and uses in all his business transactions. Wherefore the foregoing document is deemed legal.

He gives this at the solicitation of Messrs. Jose Ma. Garcia, Pedro Telles, and Simon Henriquez, for such purposes as they may deem proper to make of it.

Paso del Norte, September 11, 1871.

MO. SAMANIEGO.
L. VELARDE,
Acting Secretary.

194 UNITED STATES CONSULATE AT PASO DEL NORTE, MEXICO.

I, Edwin Lyon, consul for the United States of America, do hereby certify that the above signature of Mo. Samaniego is genuine.

Witness my hand and official seal this 11th day of September, 1871.

[SEAL.] EDWIN LYON, *Consul.*

195 EXHIBIT C.

Citizen Political Chief of the District of Bravos:

The special committee which applied to you a short time ago requesting authenticated copies of the documents of the commons or area of the village of Refugio (now in the United States of the North), to legally establish the just right to their property, recognized and granted by the legitimate authorities of Mexico, when that village appertained to the district under the worthy charge of this prefecture (Mexico), this day present themselves again, requesting you not to take the trouble of furnishing to them the aforementioned copies, neither through the channel of yourself nor that of the supreme government of the State of Chihuahua, as they have already obtained the copies from a commissioner in whose possession they were in said Territory of New Mexico, United States.

Therefore we tender you, sir, our most express thanks for the deference with which you have been pleased to receive our annoyances, and we only ask you will do us the favor to certify to the signature of the Curate Ramon Ortiz, who was commissioner of the Government of Mexico to issue said document. We further request that the Mexican vice-consul take the proper acknowledgment of the signatures referred to, which are seen in the annexed documents, after which please cause the same to be returned us for the use of our rights.

We believe this to be the proper step in this matter. Placing ourselves at your orders,

We remain your most obedient servant,

JOSE MA. GARCIA.
SIMON ENRIQUEZ.
PEDRO TELLES.

Town of El Paso, Mexico, September 10th, 1871.

196 EXHIBIT D.

[SEAL.]

Through the channel of the secretary's office of the supreme government of the State of Chihuahua, Mexico, this prefecture is informed by special order, dated 14th June last, what I copy to the letter:

"On the margin of the petition which has been presented to your district prefecture by the special committee of the Colony of Refugio (U. S.), soliciting the legal documents that prove the area of their commons, and which is accompanied to me by your note No. 61, dated May last, the citizen governor of the State has this day been pleased to decree the following:

"The documents referred to shall be searched for among the archives, that the copies applied for may be issued, and in case they are not found,

that the proper steps may be had. Let this action be communicated to the parties interested through the channel of the political chief of the district of Bravos—Terrazas—Delgumean, 1st officer. And I have the honor to transmit the same to you by special order for the purpose indicated in the aforesaid superior decree.

"I transcribe this to you for your information—repeating the first considerations of my esteem and consideration.

"Independence and liberty. Paso, Sept. 4th, 1871.

"MARIANO SAMANIEGO.
"F. BARRON, *Sec'y.*

"Citizens Simon Enriquez, Joe Ma. Garcia, and others."

The foregoing is a correct translation of the original documents in the Spanish language hereto attached, to the best of my knowledge and belief, with the exception of the printed paper "E."

JNO. D. BAIL.

Sworn to and subscribed before me this 31st day of January, A. D. 1874.

[SEAL.] JOHN S. CROUCH,
Clerk 3d Judicial Dist. Court.

Approved and adopted for official translation.

DAV. J. MILLER,
Translator, Sur. Gen. Office.

4—30—'74.

(Endorsement:) File 163. Translation of grant document. This document is duly recorded on pages 73, 74, 75, 76, 77, 78, 79, & 80, vol. 5 of land-claim records in office of surveyor-general.

197 DEFENDANT'S EXHIBIT C.

UNITED STATES OF AMERICA,
Territory of New Mexico, ss:

In the United States Court of Private Land Claims, sitting at Santa Fe, New Mexico.

JOSIAH F. CRISBY, PLAINTIFF,
vs.
THE UNITED STATES OF AMERICA, DEFENDANT.

To the honorable Joseph R. Reed, Chief Justice; Wilbur F. Stone, William W. Murray, Thomas C. Fuller, and Henry C. Sluss, associate justices of said court.

Your petitioner, Josiah F. Crosby, a resident of the city, county, and State of New York, plaintiff, brings this his petition against the United States, and respectfully represents:

1. That on November 20, 1851, one Guadalupe Miranda, then a resident of the Republic of Mexico, now deceased, presented his petition to Jose Maria Maese, the second judge of the town of El Paso del Norte,

State of Chihuahua, Republic of Mexico, in which petition said Miranda stated that he had fulfilled all the requirements of the law, and had duly proceeded before the governor and director of the geographical corps; that in and by said petition the said Miranda asked the said second judge to place and put him in possession of and locate one sitio and three caballerias of grazing lands situate above the dam and comprised in part of hills and ancon, called Mulleros, under the law and by virtue of a decree from the then supreme governor of the State of Chihuahua, dated July 13th, 1851.

2. That on the 21st day of November, 1851, the said second judge, acting on the said petition and the accompanying documents, and under and in conformity with said supreme decree of July 13th, 1851, and it appearing to the said second judge that the said Miranda had denounced one sitio and three caballerias of land under said decree, and had complied with the requirements of the law thereunder, and had con-
198 tinued in possession of said lands, did decree and give unto the said Guadalupe Miranda that portion as denounced by him, without prejudice to third parties pleading under better rights, and conveyed unto said Miranda full possession and legal right and full enjoyment of the fruits and profits thereof, and did decree and give and protect unto him said lands. And the said judge by said decree designated the third day of December, 1851, as the day on which he, the said judge, would convey and deliver unto the said Miranda said denounced sitio, and gave public notice thereof to any citizen to come forward and prove any right of property that they might have in the same.

3. That on the third day of December, 1851, the said Jose Maria Maese, judge of the second and first instance of the district of Bravos, accompanied by witnesses, in compliance with said decree of November 21st, 1851, surveyed and gave unto the said Guadalupe Miranda the full and legal possession of the following-described lands, with the full enjoyment of the fruits and profits thereof, to wit:

Beginning at the mouth of an arroyo called Penasquite, where the same connects with the Rio Grande, said arroyo having its source in the hills called Mulleros; thence up the said river, the river as the east boundary, 5,000 varas to Tornillal, where there is set a landmark or mound of rocks; thence from east to west for the north line 5,000 varas, crossing said Tornillal and the main road to Mesilla, to a small sand hill, where it is set another landmark or mound of stone; said north line being contiguous to public lands (valdios); thence from north to south for the west line 5,000 varas and terminating in the hills which lie to one side of Poleo Hill, said west line being contiguous to public land;
199 thence from west to east for the south line 5,000 varas, said line being contiguous to public lands, crossing a part of Poleo Hill and embracing in the angle a portion of the hills, to the place of beginning, where is set by interested party a monument of rock and mortar.

For the survey of the three caballerias, beginning at the last-named mound or monument; thence from north to south with said Rio Grande, the river being the east boundary, 3,312 varas, to a place where the hills connect with said river, at which place was set a mound with four rocks; thence from east to west for the south line 552 varas, said line being contiguous to public lands, and running from the river to the hills to a point

where is set a landmark or mound of rocks; thence on said hills from south to north 3,312 varas for the west line, said line being contiguous to public lands, to a point where is set another landmark or mound of rocks; thence from west to east for the north line 552 varas, and along a portion of the south line of the first-named survey to place of beginning. All of the foregoing statements regarding the petition of the said Miranda and the actions and doings of the said second judge will more fully and at large appear by the said petition of Miranda and decrees of the said second judge, filed herewith, marked "Exhibit A," and translations thereof, marked "Exhibit B," and prayed to be made a part of this petition.

4. That the said Miranda, before November 20th, 1851, as recited in his said petition to the said second judge, did in due form of law apply to the supreme governor of the State of Chihuahua for a grant to him of the said lands; that the said supreme governor, acting thereon, did, on the 13th day of July, 1851, make a decree authorizing and directing
200 the said second judge of the first and second instance of the district of Bravos aforesaid to place the said Miranda in possession of the said lands, and to execute to the said Miranda proper instruments of conveyance and grant thereto and therefor; and that the said second judge, in pursuance thereof, acted in the manner aforesaid, and gave to the said Miranda the papers marked "Exhibit A" as his muniments of title, and returned to said Miranda copies of his original petition to the governor of Chihuahua aforesaid and the said decree of July 13th, 1851, and retained and filed copies of all the documents mentioned herein. That the said Miranda, after December 3d, 1851, lost the copies of the said original petition to and the said decree of the governor of the said State of Chihuahua, and that they never came into the possession or control of the plaintiff, and for that reason he is unable to produce them here in court.

4b. That this claim and grant has never been considered, confirmed, or acted upon by Congress or the authorities of the United States, and never has been heretofore submitted to any authorities constituted by law for the adjustment of land titles within the United States.

5. That all the papers, documents, and decrees relating to this grant are of file and record in the archives of the Republic of Mexico.

6. That no survey as yet has been made of said lands, but plaintiff files herewith a sketch map of the same, marked "Exhibit C," which he prays may be made a part of this petition.

7. That a large part or portion of said lands are situate in the county of Dona Ana and Territory of New Mexico, and a part in the Republic of Mexico, as will appear by the said sketch map marked "Exhibit C."

201 8. That the said lands were granted as aforesaid to the said Miranda for grazing and pastural purposes.

9. That the lands embraced within the boundaries of said grant amount to four thousand seven hundred and fifty-one and eight-tenths acres, and is nonmineral in character.

10. That the said Miranda, from the time of the grant of said land to him as aforesaid until the eighteenth day of the month of January, 1888, owned and possessed said lands, and that on the said last-mentioned day the said Miranda granted, conveyed, and sold to the plaintiff the said

described and granted lands by deed of that date, which said deed is filed herewith, marked "Exhibit D," and prayed to be made a part of this petition.

11. That this claim and grant is a perfect one; that plaintiff is and has been in the possession of the lands within the limits of said grant from and after the execution of said deed to him by said Miranda, and knows of no conflict whatever to his title thereto.

Plaintiff therefore prays that this petition and the matters and things therein stated be considered by this court; that the validity of said grant of land be inquired into and decided, and that the said described portion of said grant of land lying within the Territory of New Mexico be decreed and confirmed unto said plaintiff, and for such other and further relief as may seem meet and proper.

D. B. NEWCOMB,
Counsel for Plaintiff.

202 DEFENDANT'S EXHIBIT C. C.

To the second judge of this town:

Guadalupe Miranda, of this neighborhood, of your jurisdiction, in conformity with the prescribed forms, appears, saying that owing to an error in the registration of a previous application he did, on the 19th of Feb'y of the present year, renew said application to the governor of the State for one sitio and three caballerias of grazing lands, in accordance and subject to a decree dated Oct. 22nd, 1833. Said lands are found above the dam and comprised a part of the hills and the ancon called Mulleros, and where the applicant has had for some time his ranch. And after due course of procedure before the governor and the Director of the Geographical Corps, and conforming with the legal citations past and present, and after fulfilling all the requirements of law, and in virtue of the decree from the supreme governor of the State, dated July 13th of the present year, and in order to settle his rights, he applies to the said judge to put him in possession and locate said lands at the locality above named. And affirms that he does this according to justice and not with malicious intent.

Paso del Norte Nbre. 20 de 1851.

GUADALUPE MIRANDA.

VILLA DEL PASO, *Nbre. 21, 1851.*

That, in accordance with the above petition and accompanying documents and in further conformity with the supreme decree of July 13th of the present year, said Guadalupe Miranda, having denounced under said decree one sitio and three caballerias and complies with the requirements of the law under said decree, and having continued in possession of said lands, give unto the said Guadalupe Miranda that portion as denounced without prejudice to third parties pleading under
203 better rights, conveying unto him full possession and legal right and full enjoyment of the fruits and profits thereof. And give, protect, and defend unto him said lands, designating the third day of the following month, December, on which day the present (acting) judge will convey unto Guadalupe Miranda said denounced sitio at the locality

as expressed and give public notice thereof. Giving notice to any citizen to come forward and prove any right of property they may have in the same. *The 2nd judge of the 1st inst. hereby decrees, orders, and signs* with witnesses, etc.

JOSE MA. MAESE.

Attest:
H. BARRONA.
FELIS LERMAL.

In the village of El Paso del Norte, on the third day of the month of December of the year one thousand eight hundred and fifty-one, I, Jose Ma. Maese, judge of the 2nd and 1st inst. of the district of Bravos, in compliance of the decree of the 21st ult., accompanied by my witnesses and the applicant, citizen Guadalupe Miranda, proceeded to the hills contiguous to the ancon de Mulleros and, with a line of fifty varas, the customary measure of the country, surveyed one sitio and three caballerias as denounced by said citizen Guadalupe Miranda. Beginning at the mouth of an arroyo called Penasquite, where the same connects with the Rio Grande, said arroyo having its source in the hills called Mulleros; thence up said river, the river as the east boundary, 5,000 varas to a tornillal where is set a landmark or mound of rocks; thence
204 from east to west for the north line 5,000 varas, crossing said Tornillal and the main road to Mesilla, to a small sand hill where is set another landmark or mound of stone, said north line being contiguous to public lands (valdios); thence from north to south for west line 5,000 varas and terminating in the hills which lie to one side of the Poleo Hill, said west line being contiguous to public lands; thence from west to east for the south line 5,000 varas, said line being contiguous to the public lands, crossing a part of Poleo Hill and embracing in the angle a portion of the hills, to the place of beginning, where is set by interested party a monument of rocks and mortar.

For the survey of the three caballerias, beginning at the last-named mound or monument; thence from north to south with said Rio Grande, the river being the east boundary, 3,312 varas to a place where the hills connect with said river, at which place was set a mound with four rocks; thence from east to west for the south line 552 varas, said land being contiguous to public lands and running from the river to the hills to a point where is set a landmark or mound of rocks; thence on said hills from south to north 3,312 varas for west line, said line being contiguous to public lands, to a point where is set another landmark or mound of rocks; thence from west to east for the north line 552 varas and along a portion of the south line of the first-named survey to place of beginning.

In conclusion of this survey I hereby give unto the said Guadalupe Miranda, his heirs, without prejudice to third parties claiming the same under better rights, full and legal possession of the surveyed lands, with full enjoyment of the fruits and profits thereof.

In testimony of the true possession of the said lands I hereby
205 deliver unto him the said lands, one sitio and three caballerias, and order any persons now occupying said lands to vacate same, and will defend unto said applicant full possession of said lands, authorized by law, against any one unlawfully claiming same. Herewith return

the documents and original application, retaining a copy of the same on file in the records of my office. Signed by me and the witnesses of the *survey*, Franco. Barron, Felis Serna, and witnesses to this instrument, citizens Sisto Yrigoyen, Jose Reanes, and Pedro Trujillo, all being present and neighbors. No seal accompanies this, being unable to find same in office.

JOSE MA. MAESE.

Attest:
F. BARRON.
FELIS SERNA.
PEDRO TRUJILLO.
SISTO XRIGOYEN.

STATE OF TEXAS, *County of El Paso:*

Know all men by these presents that I, Guadalupe Miranda, a citizen of the State of Chihuahua, Republic of Mexico, for and in consideration of the sum of five dollars to me in hand paid by J. F. Crosby, of El Paso, county aforesaid, have bargained, sold, and conveyed, and by these presents do bargain, sell, and convey, unto said J. F. Crosby, the following-described tract of land situate in what is now Dona Ana County, New Mexico, to wit, being one sitio and three caballerias of land granted to said Guadalupe Miranda, and which he was put in possession by Jose Maria Maese, judge of the 2nd and 1st instance of the district of Bravos, on the third day of December, 1851, by virtue of the decree of November 21st, 1851, granted upon the petition of said Miranda, dated the 20 November, 1851.

206 To have and to hold the said bargained land, together with all its members and appurtenances to the same belonging or in anywise appertaining unto him, the said J. F. Crosby, his heirs and assigns forever. And I, the said Guadalupe Miranda, do bind myself, my heirs, executors, and administrators to warrant the title to said lands unto the said J. F. Crosby, his heirs and assigns, against the claim or claims of any and all persons claiming or to claim the same or any part thereof by, through, or under me, and no further.

Witness my hand and seal (using scrawl instead of a seal).

GUADALUPE MIRANDA.

STATE OF TEXAS, *county of El Paso.*

This day before me, William Scroby, a notary public in and for said El Paso County, Texas, personally appeared Guadalupe Miranda, personally known to me to be the person whose name is signed to the foregoing instrument, and acknowledged to me that he executed and delivered the same for the purposes and considerations therein expressed.

Witness my official signature and seal of office this the 18th day of January, A. D. 1888.

[NOTARIAL SEAL.]

WILLIAM CROSBY,
Notary Public, El Paso Co., Tex.

207 DEFENDANT'S EXHIBIT CCC.

JOSIAH F. CROSBY
vs.
UNITED STATES. } No. 139. Miranda grant.

This cause coming on this day to be heard on its merits, and the plaintiff, through his attorney, S. B. Newcomb, esq., announcing here now that he will not further prosecute said cause, and the court, upon consideration and examination of said cause, being now sufficiently advised in the premises, doth find that the said petition for the confirmation of the private land claim known and called the Guadalupe Miranda grant, situated in the county of Dona Ana, Territory of New Mexico, and described as follows: One sitio and three caballerias of land; said sitio begins at the mouth of an arroyo called Penasquito, where the same connects with the Rio Grande, said arroyo having its source in the hills called Muleras; thence up said river as the east boundary 5,000 varas to a tornillal, where is set a landmark of rocks; thence from east to west for the north line 5,000 varas, crossing said tornillal and the main road to Mesilla, to a small sand hill, where is set another landmark of stones; thence from north to south for the west line 5,000 varas, and terminating in the hills which lie to one side of the Poleo hill; thence from west to east for the south line 5,000 varas to the place of beginning, where is set a monument of rocks and mortar; said three caballerias begins at said last named monument; thence from north to sougt, with said Rio Grande the east boundary, 3,312 varas to a place where the hills connect with said river, at which place was set a mound with four rocks; thence from east to west for the south line 552 varas, running from said river to the hills, where is set a mound of rocks; thence on said hills from south to north 3,312 varas for the west line to another landmark of rocks; thence from west to
208 east for the north line 552 varas, and along the portion of the south line of said first-named survey to the place of beginning, has not been sustained by satisfactory proofs, and that the title so asserted to the said tract of land alleged to have been granted to Guadalupe Miranda under a decree dated July 13, 1851, made by the supreme government of the State of Chihuahua, possession of which is alleged to have been petitioned for on November 20, 1851, to the second judge of the town of Paso del Norte, State of Chihuahua, Republic of Mexico, which said petition is alleged to have been granted on November 21, 1851, and possession of which is alleged to have been given by Jose Maria Maese, said judge, in November 3, 1851, is of no validity, and that said grant or concession so claimed is not such an one as the United States are bound to recognize and confirm by virtue of the treaty of cession by Mexico to the United States, by the laws of nations, of by the laws or ordinances of Spain and Mexico.

It is further ordered, adjudged, and decreed that the said claim to the said tract of land be, and the same is hereby, rejected and said petition dismissed.

JOS. R. REED, *Chief Justice.*

(Here follows map marked p. 209.)

210 DEFENDANT'S EXHIBIT ONE.

SURVEYOR-GENERAL'S OFFICE,
Santa Fe, New Mexico, October 16, 1886.

Private land claim of Francisco Garcia, known as the "Santa Teresa tract." Reported No. 111.

This claim was filed in the surveyor-general's office June 4th, 1877, and on the 11th of December, 1878, was approved by Surveyor-General Atkinson. It it now before me for reexamination.

The land claimed is situate on the west bank of the Rio Grande, in that portion of the present county of Doña Ana which is embraced in the Gadsden purchase, and is known as the "Santa Teresa" tract. The grant is claimed to have been made to said Garcia at some time prior to 1790 by the Spanish authorities of what was then New Biscay, and now the State of Chihuahua, and the original title papers are alleged to have been lost during the occupation of El Paso del Norte by the United States troops in 1846, while said papers were in the possession of Jose Maria Garcia, one of the heirs of the grantee. The evidence shows that in January, 1853, one of the heirs took measures to perpetuate the evidence that the grant had been duly made and lost, as stated, and that possession of that tract had been delivered by the justice who officiated in taking and perpetuating the evidence, who also took testimony defining and fixing the boundaries of the tract. The occupancy of the land by the grantee and his heirs and representatives, beginning about the year 1790 and continuing till a recent period, is also shown.

The facts stated would establish a pretty strong equitable claim, if not a legal one, but for the sixth article of the Gadsden treaty of
211 Dec. 30, 1853, which reads as follows: "No grants of land within the territory ceded by the first article of this treaty, bearing date subsequent to the day—twenty-fifth of September—when the minister and subscriber to this treaty, on the part of the United States, proposed to the Government of Mexico to determine the question of boundary, will be considered valid, or be recognized by the United States, nor will any grants made previously, be respected or be considered as obligatory which have not been located and duly recorded in the archives of Mexico."

According to the language, as I understand it, no grant of land comprised within the territory covered by this treaty can be recognized by the United States as valid, whether the date of the grant be prior or subsequent to the time specified, unless the grant shall have been duly recorded in the archives of Mexico. As there is no proof that this was done I can not recommend the approval of this claim by Congress, nor could I do so if the grant had been produced and shown to be genuine, because the record of it in the archives of Mexico is made an indispensable condition of title.

Neither can I recommend the recognition of an equitable claim. In my opinion it could not be founded on a grant which is made invalid by a treaty between the United States and Mexico. Congress is precluded by this treaty from respecting the grant or considering it obligatory, and the equity, which the case would otherwise have presented, is lost. If I am wrong in this view I shall be glad to be set right.

Copies in triplicate of this opinion are forwarded as required.

GEORGE W. JULIAN,
Surveyor-General.

212 [Endorsement:] Surveyor-general's supplemental opinion. Disapproved. File No. 115. Reported No. 111. Francisco Garcia, or Santa Teresa grant. Oct. 16, 1886.

(Here follows maps marked pp. 213 and 214.)

215 And be it further remembered that thereafter, to wit, on the 16th day of August, A. D. 1900, being the 9th day of the August term, 1900, of this court, held at Santa Fe, New Mexico Territory, the court gave judgment as follows, to wit:

216 In the United States Court of Private Land Claims ss: At the August term, A. D. 1900.

M. R. PENDELL ET AL. vs. THE UNITED STATES ET AL. } No. 168. "Santa Teresa" grant.

Decree of confirmation.

This cause having come on for trial, hearing, and determination upon the petition of plaintiffs, the answer of the United States of America, defendant, and the intervention and appearance of Noyes Rand, James H. White, et al., as defendants herein, upon the exhibits on file and the proofs taken as well on the part of petitioners as of the defendants, full legal proof having been taken and counsel having been heard, and the petition having been sustained by satisfactory proofs, the court, being now sufficiently advised in the premises, doth find that the petitioners for themselves and on behalf of all other owners in the said tract of land are entitled to the relief as prayed for in the said petition, and that the validity and extent of the said land grant be enquired into and decided by this court; and thereupon the court specifically makes the following findings of fact:

1. That prior to the year 1790, in accordance with the petition of Francisco Garcia, a citizen of the province of New Mexico and Kingdom of Spain, then and there duly made and presented to the duly authorized representatives of the King of Spain in and for New Biscay, which is now the State of Chihuahua of the Mexican Republic, the said authorities and representatives of the Crown and the King of Spain, by virtue of the power and authority in them vested as such, and in accordance with the laws, usages, and customs of the said Kingdom of Spain, made to the said Francisco Garcia a grant of a certain piece and parcel of land situate in the county of Doña Ana, in the Territory of New Mexico, as at present constituted, the same then being a dependency and province of the said Kingdom of Spain, said piece and parcel of
217 land so granted as aforesaid being bounded, described, located, and designated as follows:

The tract of land known as the "Santa Teresa:" Bounded on the north by that bend known as the "Cobreña;" on the south by the bend of the Piedras Paradas, the same being somewhat to the north of the present location of the Southern Pacific Railroad bridge where the same crosses the Rio Grande del Norte; on the east the old bed of the said

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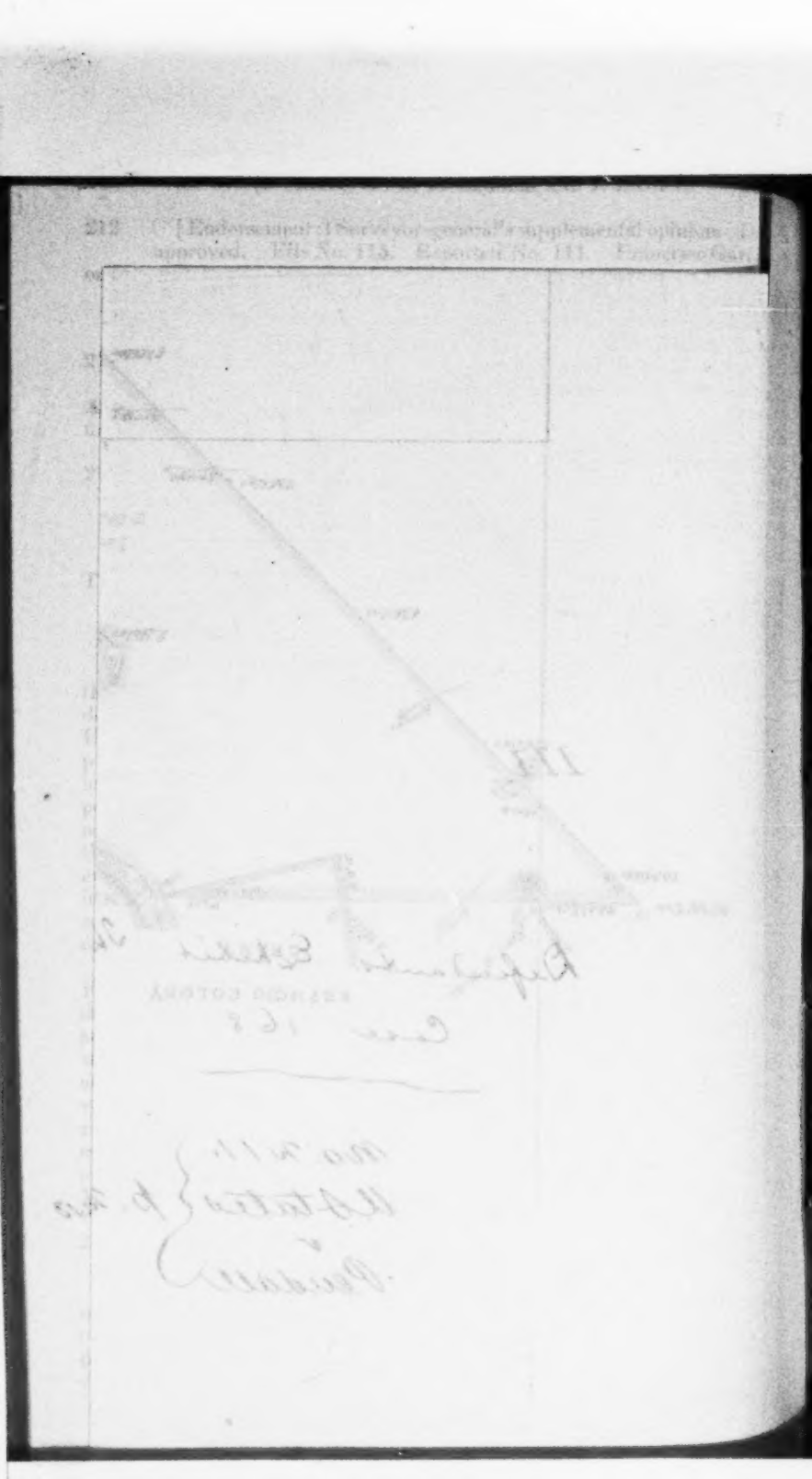
Defendant's Ex. L.
No. 2.
Case No. 168
Reporter.

MEXICO

Defendant's Exhibit Two.

No. 311.
U. States
v.
Pindell
p. 253



Rio Grande del Norte, as the same ran and existed in the year 1853; and on the west the brow of the ridge running parallel with the said river.

2. That thereupon then and there the said Francisco Garcia was duly placed in legal possession of the said grant by officials to that end duly authorized by the laws, usages, and customs of the said Kingdom of Spain, according to the laws, usages, and customs then in force.

3. That the land included in the said outboundaries continued in the possession of the said grantee, his heirs, legal representatives and assigns, from the time of the making thereof, prior to the year 1790, as aforesaid, down to the present time, and that the petitioners herein have succeeded in part to the rights of the said original grantee.

And the court thereupon finds, as matter of law, that by reason of the facts aforesaid an imperfect or equitable title and right such as the United States under the stipulations of the treaty of Guadalupe Hidalgo ought to recognize and confirm to, the said land was vested in the said original grantee aforesaid, which right and title existed at the date when the United States acquired sovereignty over the country now embraced within the Territory of New Mexico, within which the said grant is situate, and that the petitioners herein are entitled to have the same confirmed to the heirs, representatives, and assigns of the said original grantee.

It is therefore adjudged, decreed, and specified that the said private land claim, the subject of this suit, is a valid claim against the
218 United States of America for the land included within the natural boundaries above set forth, and the claim to the said land grant as designated, located, bounded, and described herein be and the same hereby is confirmed to the heirs, legal representatives, and assigns of the said original grantee, excepting, however, from this confirmation any right or title to any gold, silver, or quicksilver mines or minerals of the same, the same remaining the property of the United States.

JOS. R. REED,
Chief Justice of the United States Court of Private Land Claims.

219 *In the U. S. Court of Private Land Claims, Santa Fe, New Mexico, April Term, 1900.*

M. R. PENDELL ET AL.
versus
UNITED STATES.
} No. 168. Santa Teresa grant.

Opinion.

SLUSS, A. J.:

I am directed by the court to say that we have concluded to confirm this claim. The confirmation is based on the opinion of the Supreme Court in the case of the United States versus Chaves, reported in Volume Number 175, United States.

The first difficulty we reached in the consideration of the case was as to the admission of the proceedings taken to perpetuate evidence in Old Mexico in 1853. We find that that kind of a proceeding was authorized by the law of the Republic of Mexico of May 23rd, 1837, and this proceeding to perpetuate the evidence seems to have been taken under the provisions of that law, and in our view was legally taken under the laws in existence at that time.

The next difficulty is as to the proof of the record of that proceeding. Our judgment is in accordance with the practice we have heretofore indulged, and that the contents of a record may be proven by copies by the testimony of persons who have made an examination and comparison and testify that the copy produced is a correct copy of the original record. In this case the testimony taken before the surveyor-general is abundantly satisfactory to establish the correctness of the copy that is produced here as being a copy of the original, and not only that, but that the original record was in the custody of the proper officer and was genuine. So, in our opinion, this evidence was properly admitted.

220 Our view of the evidence is that this tract of land was in the possession of Francisco Garcia exclusively during his lifetime from the beginning of this century, and that upon his death it passed to the hands of his children and remained in their possession until long after the transfer of sovereignty of the country to the United States, and is now in the possession of their grantees and their families. There have been very few claims based upon long possession more satisfactorily made out, in our minds, than is made out by the evidence in this case. These being the facts as we find them, we feel absolutely bound by the doctrine established in the case of The United States versus Chaves, 175 United States. That case seems to have been very carefully considered, and the enunciation of the principle decided seems to have been very deliberately made; so that there can be no question as to what the Supreme Court means by it. And the doctrine announced is that a long and uninterrupted possession is as sufficient for a legal judgment in the absence of rebutting circumstances as formal documents or records or articulate testimony, and upon that testimony it is presumed that the grant once existed and has been lost. This doctrine, as announced, absolutely obviates the necessity of relying upon a written instrument or grant in order to make out a title when the possession has been so long and exclusive that it creates in the mind the belief that this possession could not have existed unless it were based upon a bona fide title. Now, the next question that arose in the case which gave us a great deal of difficulty, and especially before we received this decision, was as to whether there should be proof offered that the grant which had been made in this case had been recorded in the archives of Mexico within the meaning of the provisions of the treaty of 1853 by which the United States acquired this country; but the question seems to be solved by the declarations made by the court in the same case which I have quoted. The objection was made in that

221 case that notwithstanding there was proof of the grant—that is, that Gutierrez had a grant—but there was a total failure of proof that any juridical possession had ever been given under the grant, and that therefore no title had actually passed; but the Supreme Court deliberately solved that question by saying that this doctrine of presumption was not limited or satisfied by the presumption of only one step in the title, but that it requires the presumption of all that may be necessary for the repose title, to the absolute assurance and quietude of possession. Now, from our standpoint there does not seem to be any way to get around that position, and if facts are necessary to make out a case, absolute title is the necessary presumption from this same fact of long and uninterrupted possession.

There was another consideration which has addressed itself to my mind and the other members of the court, which is that this provision of the treaty relating to the documentary evidence by which the existence of the title or the grant is proved, following the spirit of the decisions which had been made in California, that while an apparently genuine titulo might be produced in court, yet if that was not supported by record evidence that the titulo had been issued it would not be of itself sufficient to prove to the mind of the court that it was genuine and true, and that seems to me to be the doctrine embodied in this treaty. The words used imply that. The Supreme Court, in the language of Judge Brewer in the Ely case, decided in the 171 United States, I think, seems to take that same view that it affects the value of the evidence as offered. But, however that may be, the inference to be drawn from the opinion and language deliberately used by the Supreme Court, as uttered by Mr. Justice Kenna, leaves no doubt in the mind that it must be presumed that the grant was duly and properly recorded in the archives in Mexico, that being only one of the necessary steps to be taken to make a title.

222 There has been some testimony on the subject of the boundaries. There may be some difficulty about the physical characteristics of these points named in the evidence, and it may require some further testimony to be taken, but I think probably that this evidence is sufficient. Our judgment is that the boundary on the north will be that bend which is spoken of as the Cobrena, and the south the bend of the Piedra Paradas; that point is identified, I understand. The east boundary will be where the old bed of the Rio Grande was formerly, if that can be identified, which I suppose it can from this evidence, and the west boundary will be the brow of the ridge running parallel with the river.

HENRY C. SLUSS,
Associate Justice.

(Indorsed:) 168. M. R. Pendell et al. vs. The United States. Opinion filed in the office of the clerk Court of Private Land Claims, May 1. Jas. H. Reeder, clerk, by I. L. Chaves, deputy.

223 In the Court of Private Land Claims, Santa Fe district, August term, 1900.

M. R. PENDELL ET AL. *vs.* UNITED STATES. } No. 168. Santa Teresa grant.

Dissenting opinion.

MURRAY, A. J.

If the evidence in this cause warranted the court in presuming that the petitioners had a grant to the land in controversy which vested in them a perfect title prior to the treaty of 1853 (which I do not concede), still the grant should be rejected and the petition dismissed. The doctrine of presumptions arising from long-continued adverse possession of land is fully discussed by Mr. Justice McKenna in the case of The United States vs. Chaves, U. S. Reports, vol. 175, 578. Many English

and American authorities are cited by the learned justice and applied to the facts of that case.

It is not held in that case nor in any of the cases referred to that the doctrine of presumption under any circumstances can be indulged in further than to presume everything done necessary to vest in the possessor a perfect legal title. The land in controversy at the date of the Gadsden purchase was in the State of Chihuahua, Mexico, and the right of the claimants must be determined under the provisions of the treaty of 1853, in which is the following provision:

"All grants made prior to September 25, 1853, which have not been located and duly recorded in the archives of Mexico shall not be recognized by the United States."

This provision of the treaty applies to every perfect grant made by Spain or Mexico in the ceded territory prior to September 25, 1853, which had not been located and duly recorded in the archives of Mexico.

224 It was not necessary, under the laws of Spain or Mexico, in order to vest a grantee with the valid legal title that the grant should be recorded in the archives. It certainly was not intended by the contracting parties to apply said provision of the treaty to grants that were fraudulent or made by officers not authorized to convey the public domain of Mexico which, if located and duly recorded in the archives, the United States was not bound to recognize. There is no testimony in this cause even tending in the slightest degree to show that the grant claimed had been recorded in the proper archives of Mexico. On the contrary, the evidence admitted shows that the grant was in the hands of the grantee and supposed to have been destroyed by American soldiers. So if the claimants had presented in this cause a grant which vested in the grantee a perfect legal title to the land, and proved the boundaries to the satisfaction of the court, the grant should be rejected, unless the court should feel authorized to ignore the plain provision of the treaty before referred to. It will not be contended that a presumed grant will put a grantee on any higher ground in the courts of the United States than the holder of a perfect paper title. If so, it would have been far better for the holders of perfect-paper titles in the territory ceded to the United States by the treaty of 1853, which had not been recorded in the archives of Mexico, to have destroyed their paper titles and relied on their long-continued possession and proof of loss of grants. I deem it unnecessary to discuss any other question in the case, as it appears to me the failure to show that the grant had been recorded in the proper archives of Mexico is conclusive, and therefore the claim should be rejected and the petition dismissed.

WILLIAM W. MURRAY,
Associate Justice.

225 I concur in the foregoing opinion, and I am also of opinion that the court erred in admitting as evidence the proceeding had before the judge of first instance, in 1853, under the provisions of the law of May 23, 1837. That being excluded, as it should have been, there is no competent evidence that a grant was ever made to the ancestor of the petitioners.

THOMAS C. FULLER,
Associate Justice.

226 And be it further remember'd that thereafter, to wit, on the 12th day of September, 1900, a petition and an order were filed with the clerk of said court, which petition and order are in the words and figures following, to wit:

227 *Appeal and allowance.*

UNITED STATES OF AMERICA, *ss:*

Court of Private Land Claims, Santa Fe district.

M. R. PENDELL AND J. ESCOBAR, PLAINTIFFS and appellees,
vs.
THE UNITED STATES, NOYES RAND, AND James H. White, defendants and appellants.

The above-named defendant the United States, considering itself aggrieved by the decree entered on the sixteenth day of August, 1900, in the above-entitled proceeding, doth hereby appeal from said decree to the Supreme Court of the United States, and it prays that this appeal be allowed, and that a transcript of the record, and proceedings and papers upon which said decree was made, duly authenticated, may be sent to the Supreme Court of the United States.

MATT. G. REYNOLDS,
U. S. Attorney, for Defendant and Appellant.

And now, to wit, on September 21, 1900, it is ordered that the appeal be allowed as prayed for.

WILBUR F. STONE,
Asso. Justice.

(Indorsed:) No. 168. In the Court of Private Land Claims. M. R. Pendell et al. vs. United States. Appeal and allowance. Filed in the office of the clerk Court of Private Land Claims Sept. 12, 1900. Jas. H. Reeder, clerk. By I. L. Chaves, deputy.

228 And be it further remembered that thereafter, to wit, on the 21st day of September, 1900, a citation was filed, which citation is in the words and figures following, to wit:

229 *Citation on appeal to Supreme Court.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to M. R. Pendell and J. Escobar, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, to wit, sixty days from and after the date of this citation, pursuant to an appeal filed in the office of the clerk of the Court of Private Land Claims, wherein the United States is appellant and you are appellees, to show cause, if any

there be, why the decree rendered against the said appellant, as in the said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 21st day of September, in the year of our Lord one thousand nine hundred.

WILBUR F. STONE,
Asso. Justice Court of Private Land Claims.

I hereby acknowledge service of the foregoing citation for and on behalf of the plaintiffs and appellees this 21st day of September, 1900.

T. B. CATRON,
Attorney for Appellees.

(Indorsed:) No. 168. In the Court of Private Land Claims. M. R. Pendell et al. vs. United States. Citation on appeal. Filed in the office of the clerk Court Private Land Claims September 21, 1900. Jas. H. Reeder, clerk. By I. L. Chaves, deputy.

230 And be it further remembered that thereafter, to wit, on the first day of December, A. D. 1900, there was filed in the office of the clerk a stipulation, which stipulation is in words and figures following, to wit:

231 In the Court of Private Land Claims, Santa Fe district.

M. R. PENDELL
vs.
UNITED STATES. } No. 168. Santa Teresa grant.

It is admitted by the United States that M. R. Pendell, the plaintiff herein, has succeeded to at least a portion of such interest (if any) as was held by Francisco Garcia in the premises in controversy in this cause, and that the interest held by plaintiff is sufficient to invoke the jurisdiction of the court in this cause, and it is accordingly stipulated and agreed between the parties hereto that plaintiff's exhibits numbered 5 to 11 (both inclusive), which were introduced solely for the purpose of showing such succession of interest, shall be omitted by the clerk from the transcript on appeal in this cause.

It is further stipulated and agreed that plaintiff's Exhibit C shall likewise be omitted from said transcript, the same being in words and figures identical with Exhibit A.

MATT. G. REYNOLDS,
U. S. Attorney, C. P. L. C.
T. B. CATRON,
Plaintiff's Attorney.

(Indorsed:) Filed in the office of the clerk Court of Private Land Claims December 1, 1900. Jas. H. Reeder, clerk. By I. L. Chaves, deputy.

232 UNITED STATES OF AMERICA, *ss:*

I, James H. Reeder, clerk of the Court of Private Land Claims, do hereby certify that the foregoing 231 pages contain a full, true, and perfect transcript of record entries and proceedings and of all files and papers in the cause lately pending in said court wherein M. R. Pendell and J. Escobar were petitioners and the United States were defendants, except the exhibits specified in the stipulation filed on the first day of December, 1900, and embodied in this transcript.

Witness my hand and the seal of said court this third day of December, A. D. 1900.

[SEAL.]

JAMES H. REEDER, *Clerk.*
By IRENEO L. CHAVES, *Deputy.*

233 (Indorsement on cover:) File No. 17995. Court of Private Land Claims. Term No. 211. The United States, appellant, vs. M. R. Pendell and J. Escobar. Filed December 15, 1900.

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In the Supreme Court of the United States.

OCTOBER TERM, 1901.

THE UNITED STATES, APPELLANT,
v.
M. R. PENDELL AND JESUS ESCOBAR. } No. 211.

APPEAL FROM THE COURT OF PRIVATE LAND CLAIMS.

SANTA TERESA GRANT IN NEW MEXICO.

STATEMENT.

On March 2, 1893, M. R. Pendell and Jesus Escobar filed their petition in the Court of Private Land Claims for the confirmation of what is known as the Santa Teresa land grant, situate in the county of Donna Ana, Territory of New Mexico, and alleged in the petition to contain 4 square leagues, measuring 1 league from east to west and 4 leagues from north to south (R., 1–3). The recitals of the petition are to the following effect, and upon them, so far as sustained by the evidence, the plaintiffs claim a confirmation of the grant:

The petition alleges that prior to the year 1790 a tract of land known as the Santa Teresa was granted

to Francisco Garcia by the Spanish authorities of what was then New Biscay and now the State of Chihuahua, in Mexico, and that said grantee thereupon entered upon and took possession of said tract, and he and his heirs and assigns maintained such possession peaceably up to and after the celebration of the treaty of December 2, 1853, commonly known as the Gadsden treaty.

It is further alleged that in the year 1846, while the original documents of title were in the possession of one of the heirs of said Francisco Garcia, the town of El Paso del Norte, in the State of Chihuahua, where said heir resided, was occupied by the military forces of the United States, and the said original documents of title and the official registry, where the same were recorded, were destroyed by said forces; and in order to perpetuate the evidence of title to said grant Jose Maria Garcia, one of the heirs of said original grantee, on January 7, 1853, made application to the said judicial authorities at El Paso del Norte, in accordance with the laws and customs of the Mexican Republic, and asked for a revalidation of the said title, and on January 16, 1853, said judicial authorities reestablished the boundaries and monuments of said grant and placed the heirs in formal legal possession of the same (R., 1).

It is further alleged that a certified copy of said proceedings are on file in the office of the surveyor-general for the Territory of New Mexico, and that Exhibit A, accompanying the petition, is a true copy thereof.

The petition further alleges that the boundaries of

the tract, as set forth in the act of possession made on January 16, 1858, are as follows:

> Being at the bend of the Piedras paradas, there was measured a cordel of fifty varas of the commercial vara, and was shown as the old boundary by the party interested and the practical Alejo Martinez, a thick cottonwood on the margin of the river, from which has been cut purposely solid parts of the bark from around it; and from this point proceeding above from south to north, there was measured four hundred (400) cordels of fifty varas, bounded on the east side by the Rio Bravo, the measure reaching to a cottonwood standing on the bank of the river near some sand hills, with three or four palmetto plants which are found in the bend of the Cobreña, which cottonwood was marked as a boundary by taking from it the bark until penetrating to the center of the wood. From this point the measurement turned from east to west on the north side, and there was measured one hundred (100) cordels of fifty varas, which reached above the brow (ceja) to a small forest of ojasin, at which point was placed as a landmark a pile of stone; turning the measure from north to south on the west side, there was measured four hundred (400) cordels, over the hills and near the brow (ceja), and they reached to a depression of the hills and the brow (ceja), where there was placed as a landmark a mound of earth; turning the measurement from west to east in the direction of the river, there was measured one hundred

(100) cordels of fifty varas, encountering the thick cottonwood which remained marked as the first landmark.

It is further alleged that a preliminary survey of the claim was made under the direction of the General Land Office in 1883, showing an area of 9,681.29 acres, which survey petitioners protest is not in accordance with the boundaries set forth in said act of possession; and the petition further sets forth that the grant had been considered and acted upon by the surveyor-general of New Mexico and recommended by him for confirmation by the United States as reported No. 111, but that no further action had been taken thereon in regard to said grant, either by Congress or by any other authority constituted by law for the adjustment of land titles in the Territory of New Mexico.

The petition concludes with the formal allegations bringing the case within the provisions of the act creating the Court of Private Land Claims and alleging that there is no person in possession of said land claiming the same adversely to petitioners or otherwise than by their lease or permission (R., 3). Plaintiffs finally, in their petition, pray that the validity of their grant may be inquired into and decided and that said tract, with the boundaries just set forth, be confirmed to the petitioners, the heirs and legal representatives of the original grantee, forever.

On December 29, 1896 (R., 19), the United States filed its answer denying each and all of the allegations of the petition and praying that a decree be entered rejecting the claim and dismissing the petition.

On February 23, 1897 (R., 20), Noyes Rand, James H. White, and others, claiming a portion of the premises adversely to the plaintiffs, entered their appearance as defendants in the case, joining with the Government in resisting a confirmation of the grant.

The case came on for formal hearing before the court on October 5, 1898 (R., 98), and finally on August 29, 1899 (R., 20), and upon this hearing plaintiffs introduced their muniments of title (R., 98, 21), appearing on the record as plaintiffs' Exhibit A (R., 3, 17). This document is authenticated as a correct copy of the original in the office of the second judge of the first instance at Paso del Norte by the deposition of certain witnesses taken under the direction of the surveyor-general of New Mexico by Solomon Schutz, commercial agent of the United States at Paso del Norte, Mexico, on November 23, 1878 (R., 116–119), and also by the testimony of Sostenes Rodriguez, second judicial judge at Paso del Norte, now Juarez, Mexico, and thus the legal custodian of the original of this document (R., 68–69). The correctness of the copy is also attested by the testimony of Solomon C. Schutz (R., 69–70), who testified that he had compared the same carefully with the original and that it is a true and correct copy of the same.

In view of this testimony it was assumed by the court below that the document presented was a correct copy of the original in the custody of the second judge of the first instance, or second judicial judge at the city of Juarez, and it now remains to be seen what is the purport and legal effect of that proceeding.

From this document it appears that one Jose Maria Garcia, residing at the then town of El Paso del Norte, on January 7, 1853, presented to the second judge of the first instance of said town a petition, alleging himself to be the testamentary executor under the will of his deceased mother, Josefa Horcasitas de Garcia, the widow of Francisco Garcia (R., 10). He alleges that among the property of that estate was a ranch called Santa Teresa, up the river from Paso del Norte, the document for which he had lost when the American forces took possession of the town, and he prays that in order to supply in some manner the lack of the original document there be taken the testimony of certain respectable persons existing in said town who saw that these documents were the titles to the 4 *sitios de ganado mayor*, which, prior to the year 1790, were possessed by his father, and thereafter occupied by his family until the Indians caused them to leave said premises. The petitioner asks, in view of the fact that there are still existing some servants who worked for his family on said ranch, it being notorious that said ranch had been recognized for many years as the legal property of his parents, that the testimony of Don Francisco Rascon, Don Guadalupe Miranda, Don Jose Maria Maese, Alejo Martinez, Jose Abalos, and Julian Alday be taken in response to five interrogatories set forth in his petition (R., 10–11); and that this judicial inquiry having been concluded, and the establishment of the original boundaries having resulted therefrom, that the judge might give petitioner the possession by law corresponding to him, in

the name of the Garcia heirs, said possession to serve said heirs as their title and security (R., 11).

On January 9, 1853, this petition and the will of petitioner's mother having been considered by Ventura Lopez, second judge of the first instance, that official gave his direction that the witnesses named be cited to appear on January 11, 1853, at which time "decision would be rendered in accordance with the facts." (R., 11.)

On the date named (R., 12) there appeared before Ventura Lopez, the judge just named, the witness, Francisco Rascon, who testified that he was over 60 years of age, had lived in the town of El Paso del Norte since 1813, and from that year he had known the ranch of Francisco Garcia, called Santa Teresa, because he had been there several times before it was abandoned on account of the incursions of the Indians, and that when he came to said town he heard trustworthy persons say that said Santa Teresa ranch was an old property of Francisco Garcia, that he indeed sometimes saw said Francisco Garcia on said ranch with his servants and herds. He further deposed to having had in his hands many times the "possession and original documents of the Santa Teresa ranch authenticated by one of the lieutenant-governors that governed in this district about the close of the last century," and that by reason of his father having been an employee in said town shortly after 1821, he saw the possession of said ranch on file in the archives of his father's office. Witness does not state what office his father held or what was the character of his employment.

He further deposed that although he did not remember the date, he could affirm that said possession was for from 3 to 5 leagues and that said documents were lost when the Americans took possession of said town and occupied the house of Jose Maria Garcia (R., 12).

These proceedings likewise contain the testimony of Guadalupe Miranda to the effect that at that date he was 40 years of age, and that it had been notorious in said town that for some years the deceased, Francisco Garcia, and his children possessed and occupied, with their herds, the Santa Teresa ranch (R., 12); that he had been informed by trustworthy persons that they had seen "some documents of such possession," and that it was a notorious fact that at the time of the occupation of the town by the American forces said forces took a part of the public archives, and that they also occupied Jose Maria Garcia's house, taking therefrom some documents relating to his property and papers of importance, "among them it is assured was the document of said ranch," which said ranch, according to witness's recollection, as he was informed, comprises 4 leagues (R., 12–14).

Jose Maria Maese, likewise called as a witness in this proceeding (R., 13), testified to his being over 40 years of age, and to the fact that he had been at the Santa Teresa ranch several times, and that it belonged to Francisco Garcia, and that when he was very young he had heard it said by respectable old persons that the said Francisco Garcia had had his stock on the said ranch since about the latter part of the last century. He further deposed to having seen "the title

papers to the Santa Teresa given by a lieutenant-governor of this town in the time of the Spanish rule," and that while witness did not remember the date of said document, he was certain that it comprised the donation of 4 leagues; that it is notorious that the American forces and also the Mexican abstracted a part of the archives of this town in the years 1847 and 1848, and also that the Americans occupied the house of Jose Maria Garcia, from whom they took some important papers, and that witness knew from credible persons that in said years the Messrs. Garcia lost the documents they had relating to Santa Teresa.

Witness Alejo Martinez, similarly interrogated (R., 13–14), testified to his being 60 years of age and a native of El Paso del Norte, and to having served for more than twenty years in the family of the Messrs. Garcia in different capacities, for which reason he was for some years prior to 1820 on the Santa Teresa ranch, where the Messrs. Garcia had their herds of horses and large and small stock. Witness further testified as to his knowledge of the several adobe buildings of the principal house of the ranch of Santa Teresa, the corrals and shanties built of poles for the servants; and that it was well known and notorious that the boundaries were as follows: One in the lower bend of the Piedras Paradas; on the lower side, the river; on the north side the boundary crossed the Cobreña bend, and on the side of the plain, the ridge (ceja); and that the ruins of the houses and corrals were still plainly to be seen and could be pointed out by witness, as could also the boundaries formerly recognized (R., 14).

Witness Jose Abalos, interrogated in the same proceeding (R., 14–15), deposed that he was 60 years of age and had served for more than ten years the family of the Messrs. Garcia in different capacities, and had, by reason of that fact, lived for some years prior to 1820 at the Santa Teresa ranch, where the Messrs. Garcia had their herds of horses and large and small stock, of which deponent was shepherd. Witness testified that he knew the several adobe buildings, corrals, and shanties on the Santa Teresa ranch, and that the ruins of the same were still clearly to be seen and could be pointed out by witness; and that he also knew and could point out the boundaries of the Santa Teresa ranch, which witness gave as being the same mentioned by the witness Alejo Martinez.

Julian Alday, similarly examined, gave his age to be 56 years, and testified that he had served for more than twenty years in the family of the Messrs. Garcia in different capacities, and for that reason had served on the Santa Teresa ranch, where the family of the Messrs. Garcia had their herds of horses and large and small stock. Witness testified that he knew and could point out the several adobe buildings and shanties of the Santa Teresa ranch, and also the well-known and notorious boundaries thereof, said boundaries being described by witness in the same terms as by Martinez and Abalos, the two witnesses just quoted from (R., 15).

Thereupon, Ventura Lopez, the judge just referred to, made a finding in favor of Garcia in the following language (R., 15–16).

> In view of the foregoing judicial inquiry with which the executor, Jose Maria Garcia, has proved legally the possession that for many years they have had of the ranch called Santa Teresa, above the dam of the town and the Muleros bend, and it appearing that they have even had titles to said property and these have been lost, and from what appears from the testament and judicial inquiry there is given to the executor Jose Maria Garcia, for himself and in the name of the coheirs, without prejudice to any third party proving a better right, the real, actual, personal, corporal possession, or that which better corresponds in law, by reason of immemorial possession, of the Santa Teresa ranch, with the enjoyment and benefits of the lands, woods, and pastures, and all other products to be found on said premises, and it is ordered that he be protected and defended therein, warning all not to interrupt or molest him in said possession and free use that he may deem fit to make thereof, wit out he being first heard and judgment rendered against him in court after a trial.

In the same order the judge provided that said Jose Maria Garcia should, on the 16th day of the current month, accompany him to the tract designated, with witnesses, taking with him one or two persons to point out the boundaries (R., 16).

On January 16, 1853, Ventura Lopez, describing himself "second judge of first instance of this canton

of Bravos," recites that, accompanied by the assisting witnesses and instrumental witnesses named, and in compliance with the decree just quoted, he repaired to the premises, there being also present Jose Maria Garcia and the old servant, Alejo Martinez, at which time the following is recited to have taken place (R., 16–17):

> Being at the bend of the Piedras Paradas, there was measured a cordel of 50 varas of the commercial vara, and there was shown as the old boundary by the party in interest and the guide, Alejo Martinez, a large cottonwood on the margin of the river from which there had been cut, purposely, some parts of the bark from around it, and from this point, going upward, from south to north, there were measured 400 cordels of 50 varas, bounded on the east side by the Rio Bravo, the measure reaching to a cottonwood standing on the river bank near some sand hills with three or four palmetto plants which were found in the bend of the Cobreña, which cottonwood was marked for a boundary by taking from it the bark and cutting to the center of the wood. From this point the measurement was turned from east to west on the north side, and there were measured 100 cordels of 50 varas, which reached beyond the brow (ceja) to a small growth of ojasen (senna bushes?), at which point was placed as a landmark a pile of stones. Turning the measurement from north to south on the west side, there were measured 400 cordels over the hills and near the brow (ceja), reaching a hollow in the hills and

brow, at which place a mound of earth was made for a landmark; and turning the measurement from west to east, in the direction of the river, there were measured 100 cordels of 50 varas, reaching the large cottonwood which was marked for the first landmark. And in testimony of true possession I led the executor, Don Jose Maria Garcia, by the right hand upon the 4 leagues which are contained within the measurement executed, and within the old boundaries which were pointed out to me. I led him over them and I directed him to make those who were in the said premises leave them; and in this possession I ordered that he and his coheirs and successors be protected and defended so long as judgment be not rendered against them by a court after a trial; and ordering that there be imposed upon those who may interrupt him in this possession the penalties of the law, with which proceeding this measurement was ended, there resulting therefrom the configuration of the land as is shown by the map attached to this possession. I also directed that there be given to the party in interest such copies of these proceedings as he may solicit, placing in the archives of my office the originals, signing this judicial possession with my assisting witnesses, Francisco Barron and Feliz Lerma, the instrumental witnesses, Pedro Trujillo, Jose Beanes, and Jacobo Ugarte, and the guide, Alejo Martinez, all present and residents of this town, on this common paper for lack of the corresponding stamped paper, which will be supplied by the party in interest when it can be had.

At the foot of the document just quoted is the following certificate, signed by Ventura Lopez and attested by Francisco Barron and Feliz Lerma:

> A true copy taken from the originals on file in this office on four leaves of common paper, which will be replaced by the party in interest; it agrees exactly with that from which it was taken four days after the execution thereof, in this town of El Paso del Norte. I certify.

The witness to this certificate, Feliz Lerma, on November 23, 1878 (R., 116), testified to the genuineness of his signature on this certificate and to the correctness of said copy and to the fact that he was present at the taking of the testimony of the witnesses mentioned in said proceeding, their testimony being taken down by him, and that they swore to the same facts mentioned in said proceeding exactly as expressed in the same, and that to his certain and personal knowledge the said order of the said justice was given to the act of possession as stated and set forth in said document, and that the signature of Ventura Lopez to said document is genuine.

Francisco Barron, the other witness to the certificate, also testified, on November 23, 1878 (R., 116), to the genuineness of his signature and that of Ventura Lopez and Feliz Lerma on the copy just referred to, and also to the fact that the evidence set out in said proceedings was taken by Ventura Lopez in his presence, as stated in said document, and that the decree and act of possession therein set forth were given and made as therein stated (R., 117).

It is to be noted at this point that the proceeding of 1853 was, as shown by the certified copy presented, as well as by the testimony of these witnesses who were present at the said proceeding, entirely an ex parte one, there being present no one on behalf of the Government of Mexico or on behalf of anyone except the claimants of the property. The Government accordingly objected to the introduction of this proceeding on the ground that it was improper, immaterial, irrelevant, and incompetent, and as constituting no valid evidence upon which a confirmation should be entered in the cause.

There was also introduced by the claimants, as exhibits 1 to 11 (R., 21, 98–99), certain deeds from the Garcias to the Escobars and thence unto Pendell, one of the plaintiffs in the cause. These conveyances do not require attention, however, in view of the fact that it is stipulated upon the record (R., 144) that M. R. Pendell, one of the plaintiffs herein, has succeeded to at least a portion of such interest (if any) as was held by Francisco Garcia in the premises in controversy in this cause, and thus an interest sufficient to invoke the jurisdiction of the court.

Plaintiffs also introduced in evidence certain dispositions taken before Mr. Justice Stone at El Paso, Tex., and Juarez, Mexico, being the testimony of the following witnesses: Juan Abalos, Pedro Melenudo, Pedro Balazan, Gregorio Herrera, and Jesus Velarde (R., 99), the depositions of these witnesses being found in the record, pages 22 to 68. The testimony of these

witnesses is directed to one or the other of the three following purposes: First, proof of descent by the makers of the deeds in evidence, from Francisco Garcia; second, proof of location of the natural objects named, by the proceedings of 1853 or by reputation, as the boundaries of the grant, and, third, possession by Francisco Garcia and his descendants in title of the premises in dispute. The necessity for a discussion of this testimony so far as it affects the first of these propositions is obviated by the stipulation just mentioned admitting sufficient succession of interest on the part of Pendell to prosecute the suit. The oral testimony on the subject of the location of the boundaries was directed principally to the location of the south boundary, it being an issue as to whether or not the south boundary of the grant was located at the international boundary line, as shown on the preliminary survey of this grant. (Defendant's Exhibit 3, R., 138), or above the Southern Pacific Railroad bridge, which is a considerable distance north of the international boundary line. The Government contended for the latter location, and the claimants, at the beginning of the trial, for the former. The interests represented by Rand and others, the codefendants with the Government, above referred to, were upon the tract of land lying between the international boundary and the south boundary of the grant as contended for by the Government. The decree of the court, to be presently referred to, and as finally entered (R., 138–139), fixes the south boundary at the point contended

for by the Government, and as it was announced by claimants on the hearing that this location, in view of all the proof, was satisfactory to them, it is assumed that no necessity exists for considering so much of the oral testimony as goes simply to the locations of this, the only disputed, boundary. So far as the testimony of these witnesses relative to possession is concerned, that will be considered hereinafter as a part of the argument of the cause.

The claimants likewise tendered in evidence (R., 31, 70–89) the testimony of Samuel Bean, Vicente Garcia, Jose Enriquez, and Eugene Van Patten.

Mr. Bean testified (R., 70) to being 79 years of age and to having known the city of El Paso del Norte, or Juarez, since 1846, having been a soldier in Colonel Doniphan's regiment of Missouri Volunteers in the year just mentioned. Witness testified to their having remained in El Paso del Norte at that time a couple of months, during which time they were quartered in a house that witness learned afterwards belonged to Jose Maria Garcia, with whom witness subsequently became acquainted; that they were quartered in a room adjoining the room where the archives were kept, and, the door being open, the soldiers destroyed the leaves of a ledger, as well as the loose papers, very wantonly. Witness testified (R., 71–72), over objection from the Government that such testimony was hearsay, that he knew the house they occupied belonged to Jose Maria Garcia, because he

was so informed by Garcia some years thereafter. Being asked whether the papers that were destroyed were private papers or public archives, witness testified, over objection from the Government that no proper foundation had been laid for such testimony, that he "understood" them to be public records and they had the "appearance" of being archives. On cross-examination (R., 73) witness admitted that he did not know anything about the residence of Jose Maria Garcia in El Paso del Norte beyond what he learned in conversation from him afterwards in talking about the war, and that he did not know whether said Garcia lived in El Paso in the same house where the soldiers were quartered or in a different house.

The testimony of Vicente Garcia (R., 73), Jose Enriquez (R., 81), and Eugene Van Patten (R., 89) was directed to the same points as the testimony of the witness Juan Abalos and others above referred to, and so far as the same relates to any controverted feature of this case it will be discussed hereinafter.

There was also introduced by plaintiffs (R., 99), over the objection of the Government (R., 100), the testimony of witnesses Clemente Nañes and Maximo Castañeda, taken under commission from the surveyor-general of New Mexico issued to John S. Crouch, clerk of the United States district court for the third district of New Mexico on June 28, 1877, at the town of Mesilla, N. Mex. The taking of this testimony was *ex parte*, there being present only the claimants represented by their attorney, and one of the grounds urged

by the Government for the rejection of this testimony in the court below was the fact that it was not taken before the surveyor-general of New Mexico, and thus under the circumstances which would give the Government the benefit of the presence of its duly authorized officer for the protection of its interests, but was taken before a clerk of court under an attempted delegation of his authority by said surveyor-general; that under the act of July 22, 1854, there was no power in the surveyor-general to delegate such duty and powers, and that the testimony was thus not "lawfully and regularly received" as required by section 5 of the act of March 3, 1891.

The testimony of these two witnesses (R., 113–115) was directed to two points: First, the destruction of the original title of the grant, and second, the possession held by Francisco Garcia and his successors in title.

On the first of these points witness Nañes testified (R., 113) that he had always understood that a grant of land was made to Francisco Garcia by the Mexican Government, and that witness knew that the original grant papers thereof were in the possession of Jose Maria Garcia, the son of Francisco, about the time the American troops took possession of the town of El Paso, and that it was said after they had gone that they had destroyed the original papers of the said grant; this being in the years 1846 and 1847. Witness further testified on this subject that he learned that some time after 1850 Jose Maria Garcia had applied to the

authorities to perpetuate the evidence of said grant, and either in the year 1851, 1852, or 1853 the judge at El Paso took testimony, went on the land and established the boundaries, and put Jose Maria Garcia, as the representative of the heirs of Francisco Garcia, in judicial possession of the land. So far as the testimony of this witness relates to possession under Francisco Garcia, it will be discussed hereinafter.

Witness Maximo Castañeda testified (R., 114) solely as to the possession of the tract, and his testimony will likewise be discussed on the argument as to the matter of possession later in this brief.

Plaintiffs also introduced (R., 100, 119), as Exhibit 14, a map from the office of the surveyor-general of New Mexico. This map, however, as well as the others presented in evidence, was purely upon the question of boundaries of the tract, and as the decree in that respect is, as above pointed out, satisfactory to both parties this portion of the testimony does not require further notice.

There was also introduced by plaintiffs (R., 100, 120) the opinion of Surveyor-General Atkinson favorable to this grant and recommending it for confirmation by Congress.

On behalf of the Government the subsequent opinion of Surveyor-General Julian was presented (R., 100, 137), recommending the rejection of this grant on the ground that it was not recorded in the archives of Mexico, as required by the Gadsden treaty.

On behalf of the Government there was also presented the petition of the claimants before the surveyor-general of New Mexico (R., 21, 122), showing that this grant was claimed as located above the international boundary line, this testimony being in support of the Government's contention as to the location of the south boundary. To the same purpose was directed the testimony of L. H. Davis (R., 100) and John R. Randolph (R., 106). The form of the decree, however, as to the location of the south boundary obviates the necessity of a discussion of this portion of the Government's testimony.

On behalf of the Government there was also presented the muniments of title in the Refugio Colony case, reported No. 90 (R., 21, 123–130). This Refugio Colony grant is located directly north of the premises in controversy, as shown by Defendant's Exhibit 3 (R., 138). The purpose of the introduction of these papers was to meet the suggestion made in the written opinion of Surveyor-General Atkinson (R., 122), to the effect that the claim herein asserted found corroboration in the mention of said Refugio papers of Jose Maria Garcia as having land on the south of the Refugio grant. A careful inspection of these Refugio titles shows, however, that the lands of Jose Maria Garcia therein referred to were not lands owned by him *outside* of the Refugio grant, but *within* it; the allotted lands of said Refugio grant being from the north boundary of the lands of Jose de la Luz Jaquez, who was one of the allottees thereunder, to the south of the lands of Jose Maria Garcia, who was likewise one of the allottees

thereunder. That Garcia had such relation to the Refugio grant is shown on pages 128, 129, and 130 of the record, where his name appears in at least three communications to the political chief of the district of Bravos in relation to the Refugio grant. It similarly appears in the testimony of the witness, Jesus Enriquez (R., 85), where he testifies that Jose Maria Garcia had lands in the Refugio grant, at the south end of it, and further testified in substance that the boundary named by Father Ortiz in the Refugio grant was the boundary of the land that Jose Maria Garcia had under the Refugio grant and not under the Santa Teresa grant. Indeed, as above seen, the Santa Teresa grant was not owned by Jose Maria Garcia, but by his mother's heirs, of whom he was only one, so that the reference in the Refugio grant could not have been to his Santa Teresa holding. The relation of these facts to the alleged possession by claimants of the Santa Teresa tract will be discussed hereinafter.

There was also presented on behalf of the Government (R., 21, 130–136) the proceedings and plat of what is known as the Guadalupe Miranda grant, lying for a distance of about 5,000 varas, or over 2 miles, north of the international boundary line, and thus over a large portion of the premises claimed in this suit. This clearly appears in the plat introduced as defendant's Exhibit D (R., 136). While these proceedings and this plat were introduced primarily as bearing on the proper location of the south boundary of the Santa Teresa grant—an issue eliminated by the decree—they are instructive as showing that for many years a

large portion of the tract which, it is asserted, has been universally recognized as belonging to the Garcias was claimed by Guadalupe Miranda and his successors in interest, and that these successors in interest thought enough of their claim to file a petition therefor in the Court of Private Land Claims, asking a confirmation to them of a large portion of what the claimants in this case assert has always been universally recognized as belonging to the Garcia family and their successors in title.

The cause being submitted to the court on August 30, 1899, upon the record just outlined, the court, at its April term, 1900 (R., 139), through Mr. Justice Sluss, announced its decision confirming the grant, and a decree embodying this decision was entered at the August term, 1900 (R., 138–139). Mr. Justice Murray dissented on the ground that there had been a failure to show that the grant had been recorded in the proper archives in Mexico, as required by the Gadsden treaty, and in this opinion Mr. Justice Fuller concurred, further holding that the court erred in admitting in evidence the proceedings had before the judge of the first instance in 1853 (R., 141–142).

On September 21, 1900, the Government sued out an appeal to this court (R., 143).

BRIEF AND ARGUMENT.

The decision of the court below should be reversed, and the claim rejected, for the following reasons:

1. There is no sufficient proof of a grant lawfully and regularly derived from the Government of Spain or Mexico.

2. The possession shown by plaintiffs does not justify the presumption of a grant from competent authority.

3. There is no proof that this grant was duly recorded in the archives of Mexico, as required by article 6 of the Gadsden treaty.

I.

There is no sufficient proof of a grant lawfully and regularly derived from the Government of Spain or Mexico.

The only documentary evidence of a grant presented by claimants was the certified copy of the proceedings of 1853 before the second judge of the first instance at El Paso del Norte, the contents of which have already been discussed. The majority of the court below received this proceeding as evidence against the Government and confirmed the grant. Was that holding correct?

Assuming *arguendo* that these proceedings were properly received, it is respectfully submitted that there is nothing in them to justify a confirmation. Recalling that the burden is upon the claimants to show a title lawfully and regularly derived from the Government of Spain or Mexico, this proceeding falls very far short of establishing such a title. The only witnesses who testified before Lopez in 1853 as to the official who executed the grant were Francisco Rascon (R., 12) and Jose Maria Maese (R., 13). The former testified that he had had in his hands many times the possession and original documents of the Santa Teresa ranch, authenticated by "*one of the lieutenant-governors* that governed in this district about the close of the last century." As

the only district which had been named by witness was the district of Concepcion, it is assumed that his testimony, when fairly construed, means that the original documents were signed by a lieutenant-governor of the district of Concepcion. It requires no citation of authority to show that such an officer possessed no power to make a grant at that date. Assuming, as alleged in the petition, that the land in question was in New Biscay, the power to grant it from 1786 to the end of the eighteenth century was vested in the intendants, acting in conjunction with the superior board of the treasury under the provisions of the ordinance of December 4, 1786 (Reynolds, p. 59). Lieutenant-governors had no such power. If the grant is to rest upon this proof as to the officer who signed it, it must thus fail for the reason that it thus affirmatively appears that there was a lack of power in the granting officer. Jose Maria Maese, the other witness who testified as to the granting officer (R., 13), deposed that he remembered to have seen the title papers to the Santa Teresa "given by a lieutenant-governor of this town [Paso del Norte] in the time of the Spanish rule." This is simply confirmatory of the testimony of the witness Rascon, and thus of the fact that the original documents, whatever they were, were made by an officer lacking in authority to alienate Crown lands. Nor does the proof of possession tendered before the judge of the first instance in 1853 improve the case from claimant's standpoint. Such possession is referable to the title papers mentioned by witness,

to wit, a grant made by a lieutenant-governor, an officer lacking in power to make a grant. The void concession by a lieutenant-governor of the district of Concepcion or the town of El Paso accounts for the possession proved and furnishes a plain and unmistakable cause to which it is referable. The facts on this point bring the case squarely within the rule laid down by the supreme court of California in the well-considered case of *Nieto* v. *Carpenter* (21 Cal., 455), where it is said:

> Presumptions are only indulged to supply the absence of facts. There can be no presumption against ascertained and established facts. The presumption, therefore, of a grant from the long possession of land is repelled and destroyed by the production or proof of the instrument under which the possession was held.

To the same effect is *Hayes* v. *United States* (175 U. S., 248, 261).

But it is most confidently submitted by the Government that whatever the contents of the proceedings of 1853, those proceedings were illegal and therefore were improperly considered by the court below, and the court erred in yielding to them any probative effect.

It is uncertain whether these proceedings were simply an attempt to perpetuate the testimony of certain witnesses or were designed to secure the judgment of the court as to the validity of the Garcia claim. If the purpose was the latter, the proceeding was certainly void, since it was entirely *ex parte*, and under

the Mexican system, as under that of every other, the world over, a judgment to have any validity must have been upon notice to the adverse party. There was no pretense in this case that any such notice was given the officials of the Mexican Government; so that, even assuming that the Government was subject to a suit from one of its citizens to quiet title to a tract of land, such proceeding was entirely nugatory, since it proceeded *ex parte* and without the participation of the adverse party. No law has been shown—nor can the principles of justice tolerate the idea that such law can exist—under which a judge in Mexico could take testimony and render a binding judgment in the absence of notice and opportunity to defend by the party adversely interested. To assume that such a power existed as between individuals is to hold that Mexico had no respect for private property rights; to hold that it existed as between an individual and the Government is to hold that the Government practically abdicated to its courts the power to alienate its lands, for in results there was no practical difference between exercising the power to grant lands and exercising the power to adjudicate them away without notice. Since such an adjudication was not valid against the Mexican Government, it is not valid against this Government. It was held by the court below, however, that this proceeding of 1853 was one to perpetuate testimony, and that the testimony was taken is proof against the Government now. It is to be noted that, while the taking of the deposition of the witnesses was

in the nature of a perpetuation of testimony, the adjudication based upon that testimony and the formal investiture of possession, both conducted by the judge who heard the testimony, were much beyond the purview of a mere perpetuation of testimony. But considering it a mere proceeding to take testimony, no law was produced and it is not believed that any law can be found under which a Mexican judge was authorized in 1853 to take testimony against the Government, much less to make an adjudication based on such testimony and thereupon to deliver possession of the land. If such law exists the burden was upon the claimants to present it, but this they absolutely failed to do. The only law cited by the court to sustain the admission of this testimony is the law of May 23, 1837 That law is found at page 401 of volume 3 of Dublan y Lozano's Legislacion Mexicana (section 93), and is a reenactment of article 14 of the decree of July 22, 1833 (Reynolds, p. 173). The law as translated is as follows:

> The judges of first instance in their respective territories shall have cognizance, by way of precaution, with the alcaldes of the same in the making of inventories, evidence *ad perpetuam*, and other judicial proceedings of like nature in which there is no opposition of parties.

While this law gave the power to judges of first instance to take testimony *ad perpetuam*, such power was not one to proceed *ex parte* to examine witnesses and to render judgments against either private citizens or the Government. On the contrary, it was the power

simply to proceed in certain cases and upon certain conditions, in default of a compliance with which the proceeding was simply void.

Thus, *informacion ad perpetuam* or *ad perpetuam rei memoriam* is defined by Escriche's Dictionary of Legislation and Jurisprudence as follows (p. 867):

> Testimony *ad perpetuam*, or *ad perpetuam rei memoriam.*
>
> The verification of proof which is made judicially and by way of precaution that something may hereafter be shown. Generally speaking, the depositions of witnesses are not received except in law suits and causes; but it sometimes happens that a person may lose his right if he is not permitted at once to take his testimony against the time when he may be in a situation to make use of it; when one fears, for instance, that his adversary intends or may intend to bring suit against him after the death of some old or invalid persons or in the absence of others upon whose declaration he must support his rights or exceptions. In this case, then, and other similar cases, the party in interest has the right to ask the judge to receive the declaration of witnesses beforehand, after citing the person who has an adverse interest in the matter, and in his default or absence, before two good men to witness the oath. *Law 2, Title 16, Partida 3.* Instead of the two good men, the syndic (city or town attorney) is now cited, and the testimony is sent to him at once for his action, which is restricted to stating whether or not he has anything to say against the witnesses. Said law adds that if the testimony you had been

taking in the absence of the person against whom it is to be used, he should be given notice of it or it should be denounced within one year after his return, or rather the suit should be begun within said term, under penalty that the testimony shall have no force after the year. The same law also states that this testimony is of no avail in criminal causes which may result in death or loss of a member or exile from the country, except in general investigations made officially.

The law of the Partidas cited in the definition above given is as follows (L. Moreau Lisle and Henry Carleton's translation, vol. 1, p. 194):

Witnesses can not be heard until after the suit is begun by petition and answer, unless in particular cases, wherein, if they are not heard before, the rights of the parties might be lost, as where they upon whom the parties relied to prove their claims were so old or infirm that there were apprehensions of their dying before their testimony could be taken; or when they were about to set out to join the army, or to go on a pilgrimage or to any other place to stay so long a time that it were doubtful whether they would return. In either of these cases their testimony may be taken before the suit is begun by answer. But the judge who takes it ought previously to notify the adverse party, if he were in the place, that he might, if he choose, be present at their examination. And if he did not choose to come, or were not in the place, the judge ought nevertheless to proceed to take their testimony, swearing the witnesses in the presence of good men,

writing down what they say, and sealing it up with his seal, that it may be safely kept until it should be wanted. We also say that if he against whom the testimony was taken was not then in the country the other party must notify him of it within one year if he returns, or to bring his suit within that time for the thing concerning which the testimony was taken, and if he suffer the year to elapse without doing either, the testimony of the witnesses so taken shall no longer be of any effect. Yet, if the witnesses were still alive and the plaintiff wish to produce them personally to prove his claim, the defendant can not prevent it, under pretense that their testimony had already been taken and was of no avail because not notified to him within one year, as is above said.

In this proceeding, however, none of the steps prescribed by law were taken to insure the validity of the proceeding. It is not alleged as a basis for the application that the witnesses were old or infirm, or that they were about to join the army or to go out of the country. No pretense was made by the judge of notifying the officers of the Government or any other adverse party of the intention to take this testimony.

Not content with taking testimony *ex parte* and without notice, the second judge of first instance proceeds to render judgment for the claimant and to invest him with a new possession. This was nothing more or less than an attempt to revalidate the grant. Since he had no power to make the grant in the first instance, he had no power to revalidate it; that was, as shown by

the Arizona cases just cited, an executive not a judicial function. Similar proceedings were considered by this court in *Whitney* v. *United States* (167 U. S., 529, 543, 544), and it was held that, since the Crown was no party to the proceedings, they could not be considered in the light of *res adjudicata*. It is respectfully submitted, therefore, that neither the testimony taken before Lopez nor his judgment and investiture of possession are entitled to be received as evidence or to be given the slightest probative effect. With this proceeding out of the case, there is absolutely nothing upon which claimants can demand a confirmation, unless it be the evidence produced, outside of the proceedings of 1853, to establish possession. This testimony will be next considered.

II.

The possession shown by plaintiffs does not justify the presumption of a grant from competent authority.

The attention of the court has already been directed to the fact that if the proceedings of 1853 are to be considered as evidence the possession therein shown is referable to a grant made by an officer without authority to make it, and is thus incapable of raising the presumption of a grant. Considering those proceedings as evidence, not only is the possession which they show colored by the fact of its illegal origin, but so also is all the proof of possession furnished by plaintiffs *dehors* that proceeding. In that view of the matter a discussion of plaintiffs' oral testimony as to possession becomes

unnecessary. Assuming, however, as has just been urged, that the proceedings of 1853 are not properly before the court and are out of the case, there remains to be considered what effect is to be given the remaining testimony on the subject of possession. Is it sufficient to create the presumption of a grant, and assuming that it is, can the Court of Private Land Claims confirm a claim based solely on the presumptions flowing from possession?

A number of witnesses were produced by claimants to establish the possession of the Garcias, but it is not believed that this possession was either continuous or exclusive, both of which qualities are essential to a prescriptive title. As was said by this court in the case of *Whitney* v. *United States* (167 U. S., 529, 546):

> The claimant also relies upon a long-continued adverse possession of this land, maintained for nearly one hundred and seventy years from the date of the grant, and nearly eighty years from the date of the *testimonio* issued by the alcalde mayor, Baca. Had it been shown that this possession was complete, adverse, and undisputed during the whole life of the grant, such possession would probably be regarded as complete evidence of title. Now, are we disposed to deny that the fact that the Luceros and their descendants pastured stock upon these lands is evidence of such possession? But in order to make it of any particular weight it should be shown to have been exclusive, and that no other person pastured or had the same right to pasture upon these lands. The

proceedings in the case, first above mentioned, of the intrusion by the Romeros indicate the lands to have been subject to pasture by the Indians, and other residents of that neighborhood. Under such circumstances it should be made to appear that the right of Lucero and his descendants were exclusive in this particular. In addition to this, however, it is a fact, so notorious that we may take judicial notice of it, that mere pasture on these western lands is very slight evidence of possession. The court below was of opinion that "from a practical standpoint the grazing of stock in this country has no value as evidence of practical location." In view of the fact that all or nearly all of this testimony respecting possession is given by witnesses who are descended from Lucero, or connected with his family, or are interested in the litigation, and the possession relied upon is not shown to have been exclusive or inconsistent with the use of this vast tract as a pasturage common to all the dwellers in that neighborhood, we think the court did not err in refusing to give it weight as evidence of title.

See also *Bergere* v. *United States* (168 U. S., 79, 80).

The testimony of Clemente Nañes and Maximo Castañeda (R., 113–115), taken under commission from the surveyor-general of New Mexico before a clerk of one of the district courts of New Mexico, was presented by claimants under section 5 of the land-court act allowing testimony which has been "lawfully and regularly received by the surveyor-general of New Mexico" to be used when the witnesses are dead. As

a preliminary consideration, it is submitted by the Government that this testimony was not "lawfully and regularly received by the surveyor-general of New Mexico" for the reason that he had no power to delegate the taking of testimony to the clerk of a district court. Section 8 of the act of 1854, under which the surveyor-general took cognizance of this claim, is as follows:

> SEC. 8. *And be it further enacted*, That it shall be the duty of the surveyor-general, under such instructions as may be given by the Secretary of the Interior, to ascertain the origin, nature, character, and extent of all claims to lands under the laws, usages, and customs of Spain and Mexico, and for these purposes may issue notices, summon witnesses, administer oaths, and do and perform all necessary acts in the premises.

It is evident that the purpose of this act was to provide an official who should exercise a more than perfunctory supervision of these matters. The duty imposed was evidently a personal duty. He could not delegate it to others. It was obviously his duty to be present at all hearings affecting grants, to hear the testimony, to see the witnesses, to cross-examine them. No power was given him by statute to issue commissions to take depositions, and none of the instructions subsequently issued by the Secretary of the Interior gave him any such power. The reason was very evident. In matters of this character the Government was entitled to representation. While the

investigation of these matters by the surveyor-general of New Mexico can not be said to have been in all or many of these cases of very great thoroughness, still his neglect of duty in no degree detracts from the position that the law required him to perform that duty.

The present record is an illustration of this wisdom of the requirement of the law and the danger involved in disregarding it. Here there were not even interrogatories framed by the surveyor-general, but all that was done was to issue a commission addressed to the clerk of the third judicial district of the Territory of New Mexico, directing him to take the testimony. This was taken in narrative form and returned to the surveyor-general. It was in effect an affidavit. There were thrown around its taking none of the safeguards contemplated by law, and it was in reality a delegation by him to a clerk of a district court of the performance of the duties of the surveyor-general of New Mexico. The deposition of these witnesses was not lawfully taken, so that it was not within the terms of the statute providing for the admission of testimony "lawfully and regularly received." But even if it be considered technically admissible under section 5 of the land court act, the circumstances under which it was taken—before a person having no interest in getting at the truth and without cross-examination—entitle it to but little weight. It was doubtless because of the well-known fact that much of the testimony presented to the several surveyors-general under the act of 1854 was, even when given before those officials themselves, taken without the safeguards afforded by a court of

justice that Congress inserted as a positive provision in the act of 1891 that that testimony should be given by the court only "such weight as in its judgment, under all the circumstances, it ought to have." It is respectfully submitted that the "circumstances" of the taking of this testimony condemns it to be adjudged, under the statute, of little weight.

Coming, now, to a consideration of the testimony of these two witnesses, it will be noted (R., 113, 114) that the acquaintance of Clemente Nañes with the property extended back only to 1840 and that of Maximo Castañeda only from a date a year or two earlier. Thus the length of possession prior to the treaty, which either of them establishes, is below the period which would give a prescriptive title (*Hayes* v. *United States*, 170 U. S., 637). Nañes testified (R., 113) that during the time he had known the property, from 1840 up to a year or so before 1877, the property had been occupied by the heirs and children of Francisco Garcia and his wife, especially by his son, Jose Maria Garcia, by pasturing and keeping animals on it and by cultivation, there being also houses, corrals, and other improvements on it. In view of the petition of Garcia in 1853, showing that he was at that time a resident of the town of El Paso (R., 10), the testimony of claimants' witness Bean (R., 72), that from 1854 to 1860 Garcia was living at Amoles, which is 6 or 7 miles north from the grant, the testimony of claimants' witness Van Patten that from 1859 on Garcia was living at Amoles, it would seem that the testimony of this witness as to the consecutiveness of occupation by the

Garcias is hardly justified. The testimony of Castañeda to the same effect (R., 114) is subject to like criticism. When it reflected that neither of these witnesses were cross-examined and their depositions were practically affidavits, it is not believed that this testimony will be given much weight as against the evidence presently to be considered, showing that the so-called possession was not by any means exclusive, but was shared with practically the whole country.

Juan Abalos testified for claimants (R., 22–34) as to the Garcia family and the possession of the property from the year 1850. His knowledge was evidently very limited, however, for he testified that Juan Antonio Garcia was the father of Jose Maria Garcia and Josefa Horcasitas Garcia was the latter's sister-in-law, whereas as a matter of fact the latter was Jose Maria Garcia's mother and the father of Jose Maria Garcia was Francisco Garcia, not Juan Antonio Garcia. He likewise (R., 24) fixed the Piedras Paradas as the north boundary of the grant, whereas the whole record and the decree show that it is the south boundary. He placed it 2 leagues from the east boundary, the river (R., 32), when as a matter of fact it is at the river. The rest of his testimony shows a similar confusion of the subject, that is in part accounted for by the fact that witness had not visited the premises since 1854 (R., 25, 29). Witness testified that he had worked for Jose Maria Garcia about 1850 for a month (R., 23), and described the improvements, which he states were located at a place called La Isla. It will be noted in the testimony of the other

witnesses that most of the occupation and improvements ascribed to Jose Maria Garcia were in or around La Isla. When it is noted, however, that La Isla is in the Refugio grant (R., 79, 85), and that Jose Maria Garcia was a grantee under that grant, which joins the Santa Teresa claim on the north (R., 85, 126–130), it will be seen that his possessions at La Isla lose all significance as supporting his claim to the Santa Teresa tract, and are rather to be construed as referable to his Refugio grant holdings. Witness Abalos goes somewhat into detail (R., 25–27) as to the possession held by Garcia on the Santa Teresa tract, the public notoriety attached to this possession, and the fact that persons secured permission from Garcia to plant on the land. Witness fixed the old ruins of the houses of the father of Jose Maria Garcia at a place "a little above La Isla" (R., 26), and thus within the Refugio grant. It is very peculiar that if Jose Maria Garcia owned the tract in question, including La Isla, by virtue of this Santa Teresa claim, he was one of the foremost of those applying for the Refugio grant. An inspection of the proceedings of the latter grant (R., 126–130) will show the prominence which he assumed in securing that grant, his name appearing in every one of the four documents introduced as defendant's Exhibit "BB." It is further noticeable that the portion of the Refugio tract assigned to him was the southern portion, including La Isla, and thus the very portion which the testimony of Abalos and others indicates to have been the ancient settlement of the elder Garcia, the alleged grantee of the Santa Teresa

tract. If the Garcias already owned this land, it is hard to understand why Jose Maria Garcia would have entered so strenuously and so prominently upon the task of getting it a second time from the Government. On cross-examination, witness developed quite clearly the character of the possession of the tract during the four years—from 1850 to 1854—that he knew it. Thus he testified (R., 29), as follows:

Q. You spoke of Jose Maria Garcia having flocks of animals?

A. Yes.

Q. I believe you said that he pastured his animals on the prairie. Did he?

A. Yes; and they come down to the river.

Q. People in those days pastured animals wherever they could find pastures?

A. Yes; *they had no obstacles against it.*

Q. *He pastured his animals off for miles from his ranch,* did he not?

A. Yes.

Q. *Off of this tract of land that you spoke of?*

A. Yes.

Q. *Wherever he could find pasture?*

A. Yes.

Q. And people that had animals there pastured wherever they could find pasture, too, did they?

A. Yes; *they were at large.*

Q. Both off and on this tract, wherever they could find pasture?

A. Yes.

Q. *All that country at that time was common pasturage?*

A. Yes.

Pedro Melenudo, another witness for claimants, testified (R., 35–49) to his having been born in 1810; to having worked on the Santa Teresa ranch from 1842 to 1844, during which time Jose Maria Garcia pastured there, and to having known one of the monuments of the ranch, placed there by Jose Maria Garcia, and also to having known a marked cottonwood (R., 37, 42) as the north boundary in 1842 (although it was not, as a matter of fact, marked until 1853). He also stated that the Garcias planted vegetables, etc., there, but only for a little while, and only in patches, and that not by irrigation, but by temporales, i. e., depending on the seasons for water (R., 38). Witness also testified (R., 38) that Jose Maria Garcia and his family lived there at that time, and that on the property claimed by Garcia there were houses and ruins of houses and corrals; that they would drive people away who came with animals, and the wood that was taken out was by the Garcias' written consent. On cross-examination witness developed the fact that he had only worked for Garcia a year, in 1842, and had then moved to Dona Ana, 20 or 30 miles away, where he had lived ever since (R., 41), and that all he knew was what happened in that year when he was there (R., 40). He also testified that he knew personally the father of Jose Maria Garcia, under whom the latter claimed the grant. This testimony, therefore, as to the character of possession held by Garcia the elder is most pertinent (R., 40–41).

Q. I believe you said you *knew the father of Jose Maria Garcia?*

A. *Don Juan Antonio Garcia*, and the wife of Don Antonio Garcia, Dona Josefa.

Q. Did you ever see them?

A. Yes.

Q. Where did you see them?

A. I used to work for him also, as I was 14 years old.

Q. Was that while you were living in El Paso or Juarez?

A. Yes; *but I worked at El Brazito.*

Q. And you worked for Juan Antonio Garcia, the father of *Jose Maria Garcia, in Brazito*, did you?

A. *Yes; herding animals.*

Q. In what year was that?

A. *In 1824.*

Q. When was the last time you knew Juan Antonio Garcia?

A. When I was at *the ranch of Don Antonio at Brazito, in the year 1824.*

Q. Do you know how old you were when Don Antonio Garcia died?

A. Yes; I was 14 years old.

Q. He died in 1824, you say?

A. Yes.

Q. Was that where he was living when he died?

A. Yes.

Q. How long had you been working for him at Brazito before he died?

A. I had worked about one year.

Q. Had he been living at Brazito during that year?

A. Yes; he had his animals—stock—there.

Q. And had his family there?

A. No; *the family* was not there.

Q. Did he have houses there?

A. Yes.

Q. Did he live in the house while you worked for him?

A. Yes.

Q. How much land did he have at Brazito?

A. I do not know how much land he had there, but he had quite a large tract of land.

Q. That was *when he lived there with his flocks?*

A. *Yes; all his stock was there—that he had—was there.*

Brazito is on the east side of the Rio Grande (R, 41) and miles away from this tract, so that the testimony of this witness clearly established the fact that Garcia the elder did not hold consecutive possession of the Santa Teresa grant, but, on the contrary, was living miles away, "with all his stock," in 1824, and, in fact, died far away from this property. This was thus a distinct break in the continuity of the possession, which precludes the presumption of a title under the Spanish law governing prescription. Quite as pertinent is the testimony of this witness as to the lack of exclusiveness in the possession of this tract. Thus he testifies (R., 41):

Q. You spoke of Jose Maria Garcia pasturing his flocks there in this place that you spoke of?

A. Yes; in Santa Teresa.

Q. People in those days pastured their flocks wherever they could find pasture, did they not?

A. Yes.

Q. And Jose Maria Garcia pastured his flocks out on the prairie, for miles away from his ranch, did he not?

A. Yes.

Q. And other people pastured their flocks right there near his ranch, did they?

A. Yes; also.

Q. Came down to the river there to get the water for their flocks?

A. Yes.

Q. And in times of that kind you do not mean to say that they asked the consent of Jose Maria Garcia every time they pastured there, do you?

A. No; the animals were loose.

Q. And pastures were common in those days, were they not?

A. Yes.

Q. And people pastured on this tract of land that you have spoken of as Santa Teresa tract without the consent of Jose Maria Garcia, did they not?

A. Yes.

Q. And they have done it ever since you have known that tract, have they not?

A. Yes.

Pedro Balizan, likewise produced for claimants, testified (R., 49–52) to being 89 years of age, to knowing the Santa Teresa tract, and to having hauled wood from there to El Paso for two years, from 1850, by written permission of Jose Maria Garcia. Witness testified that Garcia was at that time living in El Paso, but afterwards moved to La Isla, which, it will be recalled, was acquired by him as a part of the Refugio

grant in 1851. The testimony of this witness as to possession was adduced by counsel over the objection of the Government under the following line of examination, which is quoted as illustrative of the form of many of the questions by which claimants' counsel, at least on direct examination, was able to secure very impressive proof of possession. Thus on page 50 appears the following:

Q. Where was Don Jose Maria Garcia when he gave you that order?

A. He was in El Paso.

Q. At that time was he living up there?

A. He was living in El Paso.

Q. Did he have any ranch up there?

A. Yes.

Q. Did he have any peons or employees?

A. Yes; he had.

Q. Did he have any animals?

A. Yes.

Q. Did he have any cultivated lands?

A. Yes; he planted some strips of land.

Q. What animals did he have up there?

A. He had cows, he had sheep.

Q. Did he have any buildings or improvements?

A. Yes.

Q. What kind of houses did he have?

A. He had some jacales.

Q. Any corrals?

A. Yes.

Q. At what place were his houses?

A. They were here, and then they were moved to La Isla—to the island.

This line of examination was permitted subject to the Government's objection, but the form of the interrogatories at least suggest that the resulting answers are to be taken with a grain of allowance. On cross-examination witness admitted that his only knowledge of the place was for two years, about 1850, and that the place where Garcia had his flocks and was occupying was at La Isla, which, as we have seen, is in the Refugio grant (R., 52).

Gregorio Herrera, likewise examined for claimants, testified (R., 52) to being 85 years of age and to living at Chamisal, Mexico, and to his acquaintance with the Garcia family. He testified to having known the ranch of Santa Teresa for more than fifty years, and thus, from some date, not shown by the evidence, prior to 1848. Witness stated that when he first knew it Francisco Garcia had a small house, large corrals, and animals and four or five employees on the tract, and claimed the ranch (R., 55, 56) out to the plains under a Spanish grant, as witness once heard. Witness testified to having cut timber on this ranch, and that the wood in these *bosques*, or trunks of trees, was free then.

On cross-examination witness was asked (R., 57):

> Q. You say these bosques where you cut wood were free, were they?
>
> A. Yes; there was no owners of them.
>
> Q. Everybody cut wood there, did they?
>
> A. Everybody went there and cut them, and nobody said it was their property.
>
> Q. Nobody claimed that property?
>
> A. No.

Q. Which side of the river was that?

A. On both sides they cut wood.

Q. People cut on both sides, did they, of the river?

A. Yes.

Q. And nobody claimed on either side that as their property?

A. No.

That this free and general use of timber was on the property in question is shown by the subsequent testimony of the witness (R. 57, 58) to the effect that it was taken from the vicinity of the Piedras Paradas, the south boundary of the claim, both above and below that point. So, also, the witness demonstrated that the pasturage there was free to all, and that no exclusive dominion over it was exercised by the Garcias. A few extracts from the testimony will suffice to illustrate this (R. 58, 59):

Q. How far up the river from the Piedras Paradas did they get wood; all along the river?

A. Yes; the woods was full on both sides.

Q. On both sides of the river they got wood?

A. Yes.

Q. And nobody ever objected to their getting wood?

A. No; all the world could go there and get wood.

Q. About pasturage in that vicinity—did everybody pasture up there along that Piedras Paradas?

A. They pastured on both sides of the river, and they had a ranch on the other side at a

place called Duran Nieto, and when the Indian raids began they had to abandon these ranches.

Q. So in that time people pastured cattle wherever they could find pasture? Is that not true?

A. Yes; my father had over a hundred cattle there and asked nobody, but the Indians finished up with everything we had there.

Q. How close to the Piedras Paradas was it that your father pastured his stock?

A. From Piedras Paradas this way and out on the plains they would come down there and drink water and nobody would say anything about it.

Q. From Piedras Paradas down this way and out toward the plains, did you say?

A. Yes.

Q. From Piedras Paradas up the river, too, did they pasture?

A. Yes.

Q. Everybody pastured there?

A. Yes; cattle and cows and oxen.

Q. And nobody ever objected to their pasturing in this vicinity you have described?

A. Nobody would say anything; it was a free country; everything was free there.

* * * * *

Q. Where did Jose Maria Garcia have his ranch out there?

A. He had a ranch at Corral de Tapia.

Q. Did he have any ranch at La Isla?

A. He herded his stock up there, above and below there.

Q. Everybody did that, did they?

A. Yes; everybody would pasture and nobody would say anything to them; both cattle and oxen and cows.

Q. In those days a man did not have to own land to pasture on it, did he?

A. Nobody; everything was free.

Further testimony of witnesses on the same subject is found at pages 61–62 of the record. Recalling that the Southern Pacific bridge referred to is just south of this grant as confirmed, the following extracts appear relevant, as showing the lack of exclusiveness in the possession:

Q. From that bridge up the river is it true that the people at that time got wood of any kind whatever they could find all along on the river?

A. They went in and took their wood, and nobody would object—nobody; it was free to everybody.

Q. That was from the bridge up the river?

A. Yes.

Q. They took from the bridge up the river for many miles. Is it not true?

A. Right near there, on this side; and on the other side it was free also.

Q. So that on both sides of the river people got wood in those days wherever they could find it?

A. Yes; right here in front; on the other side it was also free. McGuffin used to take it there formerly to El Paso. I have property over on the other side.

Q. And when you first knew that place the people pastured all around there, going upon the river?

A. Yes.

Q. They came down and brought their flocks to the river to pasture them. Is that not true?

A. They would come down to the river, and they would turn them loose.

* * * * *

Q. Now, my question is, at that time is it not true that everybody pastured their flocks on both sides of the river, near that bridge, and up the river from that bridge?

A. Yes.

Q. And nobody objected to their pasturing that way?

A. Nobody.

Q. And they pastured on both sides of the river for miles from that bridge. Is that not true?

A. Yes; and a man could go and get wood and nobody would say anything to him.

Jesus Velarde, examined for the plaintiffs (R., 62), testified to his being 65 years of age and thus born in 1833, and to his having lived all his life in Juarez or Paso del Norte. Witness testified to knowing the tract of Santa Teresa now held by Escobar (R., 63), although he had not been there since 1854 (R., 68), and that witness had his cattle there, claiming an interest in the land under another grant given him (R., 65) or to his father (R., 66) by the Mexican Government. Witness testified that the Escobars had driven him out after they bought from the Garcias, which it may be here

remarked was some time after the treaty. He also testified that the Garcias had occupied the lands there a long time with animals, employees, and had a little house there; that they had had it ever since witness "opened his eyes" and witness understood it belonged to Garcia (R., 64, 65). On cross-examination witness testified further as to this concession to his family as follows (R., 66):

> Q. At that time your father was pasturing there and had control of the land that he claimed as a concession, was he?
>
> A. Yes.
>
> Q. And was occupying it and claiming it, was he?
>
> A. Yes.
>
> Q. And he continued to occupy and claim, did he not, until the Americans took possession of this country?
>
> A. I had my cattle there for years; then the Americans came and I had nothing more there.
>
> Q. And you had your cattle there under this concession made to your father under the Mexican Government?
>
> A. Yes; I had my cattle there under this concession.

As bearing on the character of the possession exercised over this tract and the fact that it was not exclusive in the Garcias, the following testimony (bearing in mind the fact that the tract runs from the Piedras Paradas north along the river) is exceedingly pertinent (R. 67):

> Q. Along the river at that time a great many people pastured, did they not?

A. Yes.

Q. People pastured all along the river on both sides of the Piedras Paradas; people pastured all the way up?

A. All that way, and always pastured up that way.

Q. And nobody objected to their pasturage?

A. No.

Q. It is considered as public pasturing grounds, was it?

A. Everybody would pasture there as public ground; everybody pastured.

Q. On both sides of the river?

A. Wherever there was a crossing we would go across, back and forth; when we would cross over there we would very often find all the oxen and horses there on the other side of the river.

Q. And other people pastured their oxen and horses on the other side of the river, too?

A. All El Paso pastured up there.

Q. And the people got wood up there, on both sides of the river?

A. Yes.

Q. From the Piedras Paradas, up the river on both sides?

A. Yes; from Piedras Paradas above, wherever they wished to.

Q. For miles?

A. Yes; up to a little place called Coronas.

Q. How many miles—leagues—is that above Piedras Paradas?

A. About 4 or 5 leagues—a little more or less.

Q. Nobody made any objection to their go-

ing there to cut wood on both sides of the river from Piedras Paradas up?

A. No; not that I know of.

Witness, also, in his testimony on cross-examination, corroborated the witnesses already mentioned (R., 68), on the point that Jose Maria Garcia lived for a long time at La Isla and at Amoles, each settlement being in the Refugio grant and outside of this grant, and that Garcia died at the latter place and was brought therefrom for his burial.

Vicente Garcia was also called by claimants (R., 73), and testified that he was born in 1837 and was a nephew of José Maria Garcia. From his testimony it appears that his first knowledge of the tract in question was in 1853, when he had crossed on his way from El Paso to Mesilla, although witness had before heard of it from his father. Witness also testified that his father had told him he had a grant there, and also had shown him the northwest corner, which was a sort of monument made of stone and mortar, about a foot and a half high, and being located about 5 or 6 miles to the west of the Rio Grande, in the hills opposite the Ancon de Cobreña (R., 74, 75), and that he had first seen this monument about twenty years ago (R., 79). Witness further testified that when he first knew the property—which was the year of the treaty—it was the property of Jose Maria Garcia, and his father also had an interest there, and that they used the property for stock when the Indians did not drive them away, and also had adobe houses and corrals. Witness was of the

recollection that no lands were cultivated there when he knew the tract (R., 77), and that one Sebastian Bermudas also occupied part of the land, but by permission of Jose Maria Garcia (R., 78). On cross-examination witness testified to the fact already referred to that he lived at La Isla, and that this was the same place where Jose Maria Garcia used to live; that the latter had an interest in the Refugio grant, and his lands were at La Isla, and that *La Isla was in the Refugio grant.*

Jesus Enriquez testified for claimants (R., 81) that he had known the tract of Santa Teresa since 1852, and knew the north boundary to be at La Cobreña, and knew a monument on the north boundary near there; that La Isla was north of La Cobreña (R., 88); that he had known of this monument since he was twelve or fourteen (i. e., from about 1854), and learned of it from his father, who worked for Jose Maria Garcia on the Santa Teresa grant, and that he also knew, in 1852 (R., 87), of a cottonwood tree that had a cross on it and stones around it, located at the Rincon de Cobreña, and being, according to Jose Maria Garcia and the father of witness, a boundary tree. As this tree was not marked as a boundary until 1853, the testimony of witness would seem to be somewhat improbable. Witness testified, over objection (R., 82), that the people said that that tree was "the boundary line that had been established by Father Ortiz, and from that place there was the grant of Jose Maria Garcia," i. e., to the south. Witness also testified that when he first knew

the property (in 1852) Jose Maria Garcia used and controlled it and was recognized as the owner. On cross-examination witness testified as follows as to the connection between Jose Maria Garcia and the Refugio grant (R., 85):

Q. This Rincon de Cobreñas, where is that, with respect to the Refugio grant?

A. To the south.

Q. Do you know whether the Refugio grant was surveyed or not?

A. Yes, sir.

Q. This Ancon de Cobreña, is it or not within the Refugio grant as surveyed?

A. A part of it is taken in by the survey.

Q. This alamo that you spoke of, where is that with respect to the Refugio grant? Is it within or without the Refugio grant?

A. This line, right here at this alamo, was the one made originally by Father Ortiz.

Q. That is the line of the Refugio grant?

A. Yes, sir.

Q. Jose Maria Garcia had land in the Refugio grant, did he not?

A. Yes, sir.

Q. Right there at the south end of it?

A. Yes, sir.

Q. And that was the line that Father Ortiz mentioned as the boundary of his land?

A. Yes, sir; Don Jose Maria Garcia used to say that that was the boundary of his land.

Q. That boundary was the boundary of the land that he had under the Refugio grant?

A. Yes, sir.

The effect of this testimony is to show what indeed is evident from the Refugio papers themselves, that the reference therein to the lands of Jose Maria Garcia is to the lands held by him as a part of the Refugio grant. In other words, that the boundary fixed by Father Ortiz, who executed the Refugio grant, was, to use the words of witness, "the boundary of the land that he (Garcia) had *under the Refugio grant.*"

Eugene Van Patten testified on behalf of claimants (R., 89–98) that he had known the tract in question well since 1859, its owner being Jose Maria Garcia; that Garcia did not live on the tract, but at Amoles, 6 or 7 miles north of it; that witness, under an arrangement with Garcia for a part of the land, lived on it with his family for nearly a year, in 1865–66 (R., 89). Witness testified to knowing where the northwest and northeast corners of the grant are, this being upon what the old people at Amoles said as to them and recognized as the boundaries. Witness also knew of the location of the tree near Piedras Paradas on the south boundary (R., 91), and also the southwestern corner of the grant (R., 92), the latter having been pointed out to him by Garcia. Witness also stated that in 1865 a few others pastured stock there, but by permission of the Garcias, and similar permission was secured by the people down in El Paso to take out rafters and wood and such things, and that everybody respected it as Garcia's grant (R., 93). On cross-examination witness admitted (R., 94) that he was employed as agent for the owners in getting up testimony and bringing witnesses to testify, and had had an interest in the grant (R., 94)

He further admitted that, notwithstanding his assertion that everybody recognized Garcia's title, when he was in charge of the grant he (witness) had to run a good many off who tried to go in to pasture and get water there.

This closed the testimony on the subject of possession and upon it, it is respectfully submitted, no case has been made out justifying the presumption of a grant. The most positive witnesses are perhaps the three last, and their testimony is as to possession since the treaty, and this, no matter how "exclusive and notorious," is not to be regarded as an element going to make up a title. (*Hays* v. *United States*, 175 U. S., 259, and cases cited.) The testimony of the other witnesses is all to the effect that the possession was not of the exclusive character which under the holding in *Whitney* v. *United States* is necessary to a title by prescription. If, therefore, possession ran against the Spanish or Mexican Government, the case made by plaintiffs does not call for the application of the rule.

It is respectfully submitted, however, that possession, however long continued, did not ripen into title as against either the Spanish or Mexican Government, and can not constitute the basis of a confirmation against the United States, the successor in sovereignty.

The principle of nullum tempus is one universal to all nations, and is firmly engrafted upon our own system of government.

Lindsey v. *Miller*, 6 Pet., 672;
Weber v. *Harbor Commissioners*, 18 Wall., 70;

Sparks v. *Pierce*, 115 U. S., 408;
Gibson v. *Chouteau*, 13 Wall., 99;
Redfield v. *Parks*, 132 U. S., 239.

The reason of the principle is very clearly stated in the case of *Lindsey* v. *Miller* (9 Pet., 672), where it is said:

> It is a well-settled principle that the statute of limitations does not run against the State. If a contrary rule was sanctioned it would only be necessary for intruders upon the public lands to maintain their possessions until the statute of limitations shall run and then they would become invested with the title against the Government and all persons claiming under it. In this way the public domain would soon be appropriated by adventurers. Indeed, it would be entirely impracticable by the use of any power within the reach of the Government to prevent this result. It is only necessary, therefore, to state the case in order to show the wisdom and propriety of the rule that the statute never operates against the Government.

If this principle is so closely guarded under our system of government, where the instrumentalities of government and the facilities for travel are so efficient to discover and to prevent any appropriation of public land to private use, how much more is its existence to be presumed in the case of a monarchy, with all its royal prerogatives and its sovereign attributes. This is especially true when it is reflected that the sovereign in this instance (assuming the grant to have been made in 1790 as alleged) was across the seas and his domain included vast and inaccessible territory, whose adverse

occupancy by adventurers would not in all probability be brought either to his royal notice or even to the notice of his agents in the ultramarine provinces. Certainly the reason of the principle as applicable to the Spanish provinces is so apparent as to make an assertion of its nonexistence a matter of skepticism, or at least of the most careful scrutiny.

This subject is one which has engaged the attention of the courts of this country a number of times, and it is believed that any lack of harmony in the decisions as to the prescriptibility of public lands finds at least a partial explanation in the fact that most of these cases involve controversies as to the right of possession between individuals, and in which deeds or grants have been presumed in aid of a long possession. The difference in principle between this class of cases and that in which the sovereign contends with subject, asserting his title paramount to the soil, is quite obvious.

Perhaps the most recent and thorough work on this subject is that entitled "Legislation and Jurisprudence on Public Lands," by Wistano Luis Orozco, esq., of the Guadalajara, Mexico, bar, published in 1895. This publication has been quoted from by this court in several recent cases, notably in the *Santa Fe case* (165 U. S., 710), and quotations therefrom have been made in a number of briefs filed in this court in cases appealed from the Court of Private Land Claims, among them the case of *Ely's Administrator* v. *United States*, reported in 171 U. S., 220.

In the supplemental brief for the Government in that case appear the following extracts from Mr. Orozco's work, which are reproduced as quite pertinent here:

> The Crown of Spain, and afterwards the Mexican Government, always claimed and disposed of these overplus lands.
>
> The first Spanish law we find on overplus lands is Law XIV, Title XII, Book IV, of the Compilation of the Indies, of Philip II, of November 20, 1578, March 8, 1589, and November 1, 1591, as follows:
>
> Inasmuch as we have fully succeeded to the seigniory of the Indies, and inasmuch as the vacant lands, soils, and grounds that have not been granted by the kings, our predecessors, or by us, or in our name, belong to our royal patrimony and crown, it is necessary that all the land that is held without just and true titles be restored to us, according and as it belongs to us, so that, reserving, before all things, what should appear to us or to the viceroys, audiencias, and governors to be necessary for parks, town common, municipal domains, pastures, and vacant lands for the places and councils that are populated, as well as with regard to what concerns the future and the increase they may have, and allotting to the Indians what they may have need for farming and for making their plantations and for stock raising, confirming them in what they now have and giving them again what is necessary, all other land may remain and be free and unburdened to grant and dispose thereof at our will. For all of which we order and command the viceroys and presidents

of the pretorian audiencias to set, when it shall appear to them convenient, a proper term for the possessors to exhibit before them and the ministers of their audiencias, whom they shall appoint, the title of lands, stock farms, Indian farms, and *caballerias*, and, after protecting those who hold under good titles and instruments or just prescription, the rest be returned and restored to us to dispose thereof at our will.

Mr. Orozco, after quoting this law, Vol. II, page 1007, says:

"And Law XVII of the same book and title expressly declares that the public lands are a part of the royal exchequer. The same declaration is found in Chapter XIII of the Royal Instructions of October 15, 1754."

"Relying on the test transcribed, we can set down the principle:

"*The public lands in the Republic of Mexico are imprescriptible.*"

In his Volume II, Title III, pages 993, et seq., entitled "Prescription," the learned author very thoroughly discusses the general propositions of prescription, including a full consideration of the two legal phrases very often argued against the views here urged. One of those phrases, the term "a just prescription," is found in the last part of Law XIV, Title XII, Book IV, of the Compilation of the Indies, and the other, referring to "a just title by prescription," is found in chapter 4 of the Royal Instructions of October 15, 1875.

Mr. Orozco, upon a full discussion of these expressions, demonstrates (article 2) that they have no application to a case such as is presented by this record,

and that even if these had force they were repealed by the provisions of Law IX, Title VIII, of Book II, of the Novisima Recopilacion, which provides that the royal lands and other property (*bienes*) belonging to the Royal treasury are absolutely imprescriptible, and orders that the prescription can not be acquired even by time immemorial, which by the same law shall be considered interrupted and annulled. The Novisima Recopilacion having been approved and ordered observed as the law of the Spanish dominion by King Charles IV in a cedula dated July 15, 1805 (Orozco, vol. 2, title 3, article 2), this was a declaration which interrupted the running of prescription from that date, even if it ran before against the Crown. (*Weber* v. *Harbor Commissioners*, 18 Wall., 57, 71.)

See also on the proposition that time did not run against the sovereign in Mexico: Hall's Mexican Law, sections 56, 612, 639; *Ely's Administrator* v. *United States*, 171 U. S., 233; *Crespin* v. *United States*, 168 U. S., 208, 218.

But whether prescription did or did not run against the Crown, it is confidently submitted that a title resting solely on prescription is not such a claim as the Court of Private Land Claims had jurisdiction to confirm.

An even casual examination of the act of 1891 will show that its provisions do not confide to the Court of Private Land Claims the duty of confirming claims resting upon mere possession. Thus the provision of section 6 that "any person * * * claiming lands

within the limits of the territory derived by the United States from the Republic of Mexico * * * by virtue of any such Spanish or Mexican grant, concession, warrant, or survey as the United States are bound to recognize and confirm," may present his claim, is utterly inconsistent with the theory that anything but a written muniment of title can constitute the foundation of a suit in the Court of Private Land Claims.

In *Lafayette et al.* v. *Blanc* (3 La. Ann., 59) the language construed was identically the same contained in this act, being "the title to lands claimed by virtue of incomplete French or Spanish 'grants, concessions, warrants, or orders of survey,'" and this was held by the court not to confirm any claim unsupported by written evidence of title emanating from the French or Spanish governments. (See also *State* v. *Cardinas*, 47 Tex., 250).

The act of 1891 is, in its description of the class of titles which it covers, very similar to the act of May 26, 1824 (4 Stat. L., 52), the wording of the latter being "by virtue of any French or Spanish grant, concession, warrant, or order of survey legally made, granted, or issued by the proper authorities." In cases arising under the act, as reenacted by the law of July 17, 1844 (5 Stat. L., 676), it was held that there was "no power to act upon evidence of mere naked possession, unaccompanied by written evidence, conferring or professing to confer, a title of some description."

United States v. *Powers' Heirs*, 11 How., 569.
United States v. *Rillieux' Heirs*, 14 How., 188.

The further provisions of the act of 1891 are still more conclusive of the proposition that the court can not proceed upon *mere* naked possession. Thus section 6 further requires the petition to state the *date* and form of the grant, possession, warrant, or order of survey.

The act of 1824, above referred to, contained a like provision, and its purpose is discussed in *Moore's case* (12 How., 216), where it is said that this is required "in order that it may be seen whether the officer making the concession or sale had the power to do so at the time it was done." But if grants may be confirmed on allegations and proof of mere possession, this provision of the statute becomes nugatory and senseless, as does the further provision of section 6, which requires that the petition state "by whom" the grant is made.

Further, under section 8, the section under which this claim is filed, permission to invoke the jurisdiction of the court is extended only to those holdings under a *title* derived from the Spanish or Mexican Government. This *title* must be one "lawfully and regularly derived" from one of the governments just mentioned (subsection 1 of section 13); and not only that, but it must be made to "appear" that it is so derived. (*Hayes* v. *United States*, 170 U. S., 637.) It must further be made to "appear" that every condition and requirement, either antecedent or subsequent, contained in the original grant has been performed in the time and manner stated in such grant. All these provisions

of the act of 1891 show that it was not intended to include claims resting upon mere possession; and the provisions of the statute are equally exclusive of grants resting upon naked possession, whether such possession shall have extended back a half dozen years or a century before the treaty.

If there were any doubt upon this proposition, it is, however, dispelled by the fact that Congress in the act of 1891 has not only withheld from the Court of Private Land Claims the power to recognize anything short of a paper title, but has actually confided to another department of the Government the power, under certain restrictions, to recognize and provide for possessory claims. Thus, under section 16 of the act as amended by the act of February 23, 1893 (27 Stat., 47), provision is made for the protection of anyone who has, "through himself, his ancestors, grantors, or their legal successors in title or possession, been in the continuous, adverse, actual, bona fide possession" of the land for twenty years next preceding the time of survey of the township wherein situate. Under this section, upon making proper proof, such possessor of land may receive a patent therefor to an extent not to exceed 160 acres. A similar provision is made in section 17 of the act, as amended by the act of February 23, 1893, above referred to, for persons claiming title in townships already surveyed who had been in "actual, continuous, adverse possession" of lands for twenty years next preceding such survey.

These two sections measure the degree of recognition which Congress is thus far willing to accord to claims resting upon mere possession, although such possession may have been sustained for years under the former Government. To secure more liberal recognition, parties must either present to the Court of Private Land Claims "a grant, concession, warrant, or order of survey" lawfully and regularly derived from the Government of Spain or Mexico, with which they can connect themselves, or, if unable to do this, they must appeal to the legislative department of the Government.

In urging these considerations, counsel for the Government have not overlooked the case of *United States* v. *Chavez* (175 U. S., 509), cited by the court below. In that case, however, there was in the archives a formal grant, covering the southern portion of the claim presented; also in the archives deeds referring to the northern portion of the claim as a "grant." There was an approval by the governor of New Mexico, in 1785, of proceedings partitioning the land in controversy among the persons under whom the claimant deraigned title; and, finally, there was an admission by the Government that one of the claimants had had open and notorious possession and use of portions of the lands as far back as the memory of the oldest member of the pueblo of Isleta could extend. Upon that state of record this court indulged the presumption of intermediate deeds from the grantee in the document of 1716 to the claimants of 1785 and con-

firmed the claim. That is not this case, however. Here there is no title paper presented of any kind; there is not the slightest archive evidence to support the claim; there is no attempt to prove any recognition by the executive authorities at any time, and there is totally lacking the proof of exclusive possession which was admitted or proved without contradiction in the Chavez case. The divergence between the two cases is so apparent as to render unnecessary a more critical discussion of the differences.

III.

There is no proof that this grant was duly recorded in the archives of Mexico, as required by article 6 of the Gadsden treaty.

The article of the treaty just referred to is as follows (10 Stat., 1031, 1035):

> No grants of land within the territory ceded by the first article of this treaty bearing date subsequent to the day—25th of September—when the minister and subscriber to this treaty on the part of the United States proposed to the Government of Mexico to terminate the question of boundary will be considered valid or be recognized by the United States, or will any grants made previously be respected or be considered as obligatory which have not been located and duly recorded in the archives of Mexico.

Was this grant duly recorded as required by the treaty?

It seems unnecessary, as showing what is meant by a "record," to do more than to cite the court to the

long line of California cases, beginning with *Fuentes* v. *The United States* (22 How., 443) and running down to *Peralta's case* (3 Wall., 434). In *Luco's case* (23 How., 515) it was held that no grant should be received as genuine by the courts of the United States "unless it be found noted in the archives or the *expediente*, or some part of it found on file among the archives where other genuine grants of the same year are found." In *Bolton's case* (23 How., 347) it was held that the record referred to in the regulations of 1828 is "the *evidence* of the grant," and that while the *titulo* given by the governor "serves among individuals the purpose of evidence," the Government, when it instituted inquiries into the subject, is "entitled to require the production of that official record which it has prescribed to its officer for its own security and as a necessary condition of a legal administration and as a necessary precaution against fraud." So *Vallejo's case* (1 Black, 541), quoting *United States* v. *Sutter* (21 How., 175), says that "in every well-regulated Government the deeds of its officers conveying parts of the public domain are registered or enrolled to furnish permanent evidence to its grantees of the origin of their title." So in the *Peralta case* (3 Wall., 434) it was said:

> But the important fact to be noticed is that a record was required to be kept of whatever was done. This record was a guard against fraud and imposition, and enabled the Government to ascertain with accuracy what portion of the public lands had been alienated. The record *was the grant*, and without it the title was not

> divested. The governor was required to give a document to the party interested, which was evidence of title, and enabled him to get possession, but his "*titulo*" did not divest the title unless record was made in conformity with law.

In the case of the *United States* v. *Castro* (24 How., 349) it said:

> It is sufficient to say that it [the grant] was required to be in writing, the officer and tribunals before which it was to pass designated, and every step in the process from the petition of the party to the final consummation of the title was not only required to be in writing, but also to be *deposited* and *recorded* in the proper public office among the public archives of the Republic.

The necessity for both *deposit* and *record* in the public archives is reiterated in *Berreyesa* v. *United States* (154 U. S., 628), cited with approval in *Whitney* v. *United States* (181 U. S., 110).

The case of *United States* v. *Vallejo* (1 Black, 555) discusses the necessity for both retaining the original in the archives and making a record of the grant, the first being done in all civil-law countries, so that parties may secure certified copies thereof, and the other to afford the Government protection against its officers and notice of their actions.

In *Peralta's case* (3 Wall., 434), above cited, which is the leading one on the subject, reference is made to the presence of the expediente in the archives as a part of the record evidence necessary to support the claim.

To the same effect, and bearing on both the necessity for and method of "record," are the *Teschmaker Case* (22 How., 405), the *Pico Case* (22 How., 406), the *Castro Case* (24 How., 346), case of *Knight's administrator* (1 Black, 228), *Neleigh's Case* (1 Black, 298), *Romero's Case* (1 Wall., 742), *White's Case* (1 Wall., 660), the *Berreyesa Case* (23 Lawyer's Coop. ed., 912), and the more recent cases of *Ortiz* (176 U. S., 422), *Elder* (177 U. S., 104, 118), and *Whitney* (181 U. S., 109).

Perhaps the latest expression from this court on this point is found in *United States* v. *Elder* (177 U. S., 118), where this court, speaking through Mr. Justice White, says:

> The constituents of the preliminary papers leading up to a grant, and the grant itself, and the distinction between them, to which attention had been so often directed by this court, was pointedly reiterated in the statement of the case made by Mr. Chief Justice Fuller in *Ainsa* v. *United States* (161 U. S., 208, 219), as follows:
>
> "An expediente is a complete statement of every step taken in the proceedings, and a testimonio is the first copy of the expediente. A grant or final title papers is attached to the testimonio and delivered to the grantee as evidence of title, an entry is made at the time in a book called the Toma de Razon, which identifies the grantee, date of the grant, and property granted."
>
> It is manifest from the foregoing review of the decisions under the California act that it was held that, in order to vest an applicant under the regulations of 1828 with title in fee,

> either absolute and perfect, or conditional and imperfect, to public land, substantial compliance with the preliminary requisites to a grant was essential; it was necessary that a grant should be evidenced by an act of the governor, clearly and unequivocally conveying the land intended to be granted, and a public record in some form was required to be made of such grant.

If the necessity for record evidence of a grant was so strongly emphasized and so consistently insisted upon in the California cases, which were considered under the treaty of Guadalupe Hidalgo, the necessity for such record under the Gadsden treaty is infinitely stronger, since the latter requires proof that the grant was "duly recorded," and the treaty of Guadalupe Hidalgo does not. The insertion of this provision in the Gadsden treaty was for a definite purpose, and that was that the United States might know what it was getting, and might not run the risk of being confronted with claims of which the Mexican archives did not give it full notice. To constitute such notice—*i. e.*, a record—two things must concur: *First*, the expediente must be in the archives; and, *second*, an entry of the issuance of the title must be made in the book of Toma de Razon. Such records must be sought in the appropriate "seat of government" for the province, intendency, State, or Territory, in which the grant was located. (*Vallejo's case*, 1 Black, 541.)

Since the proofs leave it entirely conjectural as to when this grant was made, it can not be certainly

stated where such record would probably be found if made. Assuming the grant to have been made about he year 1790, the *locus* of the grant was either in the province of New Mexico or New Biscay. If it was within the jurisdiction of New Mexico, the records are to be sought at Santa Fe; if in New Biscay, and the grant was an intendant grant, the records are to be sought at Durango; if by the commandant-general, then such records are to be sought at Arizpe or Chihuahua (dependent on the exact date), and the approvals thereof at the City of Mexico. (Hall's Mexican Law, chap. 10.) But whether these records exist at Santa Fe, Arizpe, Durango, Chihuahua, or the City of Mexico, or whether they do not exist at all, the fact remains that there was no proof of their existence presented on the trial, or of any search for them, and the case is thus confronted by the plain barrier contained in article 6 of the treaty. To confirm this grant is to hold that the treaty provisions mean nothing, and that the conditions imposed by article 6 are mere empty words.

Some testimony was produced, however, by claimants as to the loss of certain public archives at El Paso during 1846 (testimony of Bean, R., 70–73), and there are similar references in the testimony set forth in the proceedings of 1853 (R., 12–14), and it is assumed that this was intended to meet the treaty requirement. Bean testified that certain papers were destroyed at Paso del Norte in 1846, from the house of Jose Maria Garcia, which he "understood" to be "public records," and which had the "appearance" of being archives.

(R., 72.) It is evident that the witness had no personal knowledge on the subject, and the fact that the papers to which he refers were in a private dwelling indicates that they were not of the character he describes; but even if they were public records, *non constat* but that they were the records of any one of a score of public officers having nothing to do with the custody of public land titles. It is quite certain that this destruction could not have included the original archive *expediente* and *toma de razon* of this grant, however, for the simple reason that that record did not belong in Paso del Norte. That town was never at any time the seat of government for any Spanish officer invested with the power to alienate lands, and such records were not to be found there. As above shown, they belonged in Santa Fe, Durango, or one of the other places where the granting power had its official residence. But assuming that the documents which Bean saw destroyed were public documents, and that they were the *expedientes* of old land grants, that assumption still falls far short of establishing that *this grant* was "duly recorded." General proof of destruction of papers is one thing, and proof that a given grant had been duly recorded and the record thereof destroyed is something very different. The authorities on this point, if indeed they are needed, are abundant.

Thus, in *Knight's case* (1 Black, 228), it is said:

> Evidence was also introduced by the claimant tending to show that a book of records appertaining to land titles in California for the

> year 1846 was lost, but *no attempt was made to show that the grant in question was ever recorded in that book.* * * * Proof of such a loss can not avail a party in a case like the present, unless it also be shown, at least by circumstances which will justify the court in finding the fact, *that the grant was duly and properly entered in the lost record.*

So, also, in *Peralta's case* (3 Wall., 440) it was said:

> Written documentary evidence, no matter how formal and complete, or how well supported by the testimony of witnesses, will not suffice if it is obtained from private hands, and there is nothing in the public records of the country to show that such evidence ever existed. * * * But it may be said that the archives of the country may be lost or destroyed, and if so, that the party in interest should not suffer. That is true; and if the claimant can show to the satisfaction of the court that *the grant was made in conformity to law and recorded, and that the record of it has been lost or destroyed,* he will then be permitted to introduce secondary evidence of it. But the absence of record evidence is necessarily fatal, unless that absence can be accounted for.

The case just cited is especially in point, because there the court was urged to relax the rule requiring record evidence, because the case was alleged to be otherwise exceptionally meritorious; and this the court declined to do.

It was said by the court below, however, that the record of the grant should be presumed from the

possession proved—in other words, that the prohibition of the treaty might be obviated by simple proof of long-continued possession. It is believed that this is carrying the law of presumption much too far. The sixth article of the treaty was evidently a prohibition against recognizing grants that would otherwise have been valid. This was evident from the fact that there was no necessity for stipulating against the recognition of invalid grants; they would fail from their internal deficiences, under general international law. The sixth article evidently meant that were a grant perfect in form and above criticism as to the power of the granting officer, to be presented thereafter to the United States for recognition, that power should be under no obligation to respect it in any one of three instances: First, if it bore date subsequent to September 25, 1853; second, if the grant was not located; third, if it was not duly recorded. The prohibition went, not to the validity of the grant, but to considerations entirely outside of that question. Assuming that a perfect grant might be presumed from long-continued possession, the law of presumptions ceases to apply when that conclusion is reached. Long-continued possession might invest the possessor with all the rights of a perfect title, but it could not do more; it could not raise the presumption of the record of that title, any more than the possession of a perfect paper title raises the presumption of the latter's record. This is very clearly pointed out by Mr. Justice Murray in his dissenting opinion (R., 141–142), and it is there very

pertinently said that to hold that a presumed grant puts the grantee on higher ground than the holder of a perfect paper title is to say that it would have been "far better for the holders of perfect paper titles in the territory ceded to the United States by the treaty of 1853, which had not been recorded in the archives of Mexico, to have destroyed their paper titles, and relied on their long-continued possession and proof of loss of grants."

It is respectfully submitted, therefore, that upon all the grounds herein urged, the claim should be rejected and the petition dismissed.

JOHN K. RICHARDS,
Solicitor-General.
MATTHEW G. REYNOLDS,
Special Assistant to the Attorney-General.
WILLIAM H. POPE,
Special Assistant to the Attorney-General.

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In the Supreme Court of the United States.

OCTOBER TERM, 1901.

THE UNITED STATES, APPELLANT,
v.
M. R. PENDELL AND JESUS ESCOBAR. } No. 211.

APPEAL FROM THE COURT OF PRIVATE LAND CLAIMS.

SANTA TERESA GRANT IN NEW MEXICO.

REPLY BRIEF FOR UNITED STATES.

Only one or two of the positions urged by claimants in their several briefs filed in this cause seem to require a reply. The others, it is believed, are fully covered by the main brief filed by the Government.

1. It is urged (p. 11 of appellees' first brief) that the proceedings of 1852 being found in the office of a judge at El Paso del Norte comply with the treaty requirement to the effect that "grants" must be "duly recorded in the archives of Mexico." A similar position seems to be urged on page 21 of the same brief. It seems sufficient to recall the court's attention to the fact that the proceedings of 1852 are not the proceedings of grant, but are simply *ex parte* proceedings for

its revalidation. Even if these proceedings of 1852 could be considered as "duly recorded" they are not a record of the "grant," but of something entirely different. What is required by the treaty is the presence in the archives of the *expediente* of the original grant and a *toma de razon* of its issuance. The reason for this requirement is discussed in the cases on the subject of a record cited in the Government's main brief. The certified copy of a judicial proceeding instituted sixty years after the alleged date of the grant relied upon is manifestly not the *record* of the executive act, to which the treaty refers. But even considering those proceedings as the grant, their presence in the office of an obscure judge in the outposts of the State of Chihuahua, certainly do not fulfill the treaty requirement that the grant shall be "duly recorded in the archives of Mexico." Such a record is not in "the archives of Mexico" as contemplated by the treaty. The archives there referred to are those at the seat of government, the public records to which the United States, when it acquired the land in controversy, had access, and to which it would and could look to ascertain just what burdens rested upon the domain which it was acquiring by treaty. This provision in the treaty was for the protection of the United States. Certainly to hold that the record the two Governments contemplated was *any* proceeding before any court of first instance in Mexico, is to hold that the provision of the treaty is practically valueless for the purpose intended. It can not be presumed that the United States intended to

stipulate for the recognition of every grant that a judge of the first instance had acted upon and as to which he had recorded a judgment in his office. On the contrary, it is evident that what was intended was that only those claims appearing in the record of executive acts at the seat of government were to be "respected and considered as obligatory." This is clearly indicated by this court in *Bolton's case* (23 How., 350), where it is said:

> Among individuals this certificate [the *titulo*] serves the purpose of evidence. But when the Government institutes inquiries in reference to the subject it is entitled to require the production of *that official record which it has prescribed to its officer, for its own security, and as a necessary condition of a legal administration and a necessary precaution against fraud.*

To the same effect are the other cases quoted on page 68 of the Government's original brief.

2. It is further insisted by claimants (brief, p. 12) that the testimony of the witness Francisco Rascon, taken in the proceedings of 1852, establishes the record of the original grantee. The inefficacy and inadmissibility of this proceeding of 1852 has been urged in the brief heretofore filed by the United States; but acting on the assumption that it has effect as evidence, claimants urge that Rascon's testimony shows that the grant was "duly recorded in the archives of Mexico" because in the certified copy presented to the court the word for archives is, forsooth, spelt with a capital A, and because the word "*empleado*," used to describe the

official position of Rascon's father (in whose office witness says he saw the grant) means a public employee or officer. It is believed that these propositions answer themselves. Omitting a discussion of the matter of orthography involved in the use of a capital letter by the scrivener who made the copy presented, the use of the word "empleado" does not, it is respectfully urged, possess any significance. While that word often means a "public employee," it is also used in other senses. Thus (in "The New Dictionary of the Spanish Language, which includes the last edition of the Spanish Academy") the word *empleado* is defined not only as "a public functionary" but is also stated to be "applicable to those who are employed for an enterprise or a particular purpose, in the discharge of a duty more or less honorable and profitable." It is a matter of conjecture as to the sense in which the word was used by the witness; he may have meant to say that his father was a public officer, or he may not have so intended. But assuming the former, the fact that he saw among the archives in his father's office in El Paso del Norte a paper purporting to be the original of this grant falls very far short of meeting the treaty requirements, especially when it is not made to appear what character of office his father held, and when it is further remembered that Paso del Norte was never the seat of government for New Mexico, so that the original record of the grant could not have been there.

3. It seems to be asserted, however (claimants' brief, p. 23, et seq.), that the treaty of 1853 does not pre-

clude the recognition of unrecorded grants in its statement that such grants "shall not be respected or be considered as obligatory," but that this provision means simply that as to that character of grants the United States shall not be under obligation to extend recognition. It is difficult to see the force of the distinction urged by counsel, especially in dealing with a claim brought under the act of March 3, 1891. It is undoubtedly true that Congress can provide for the recognition of claims, even though barred by the Gadsden treaty, just as it can in its unlimited powers over the public domain make grants *de novo*. But this is a power belonging to Congress, not the Court of Private Land Claims. That court is in terms confined to recognizing only such grants as the United States are *bound* by the provisions of the treaty of cession to respect (subsection 1 of section 13 of the act of March 3, 1891), and the validity of each title presented is to be determined "according to the law of nations and the stipulations of the treaty." (Section 7.)

4. It is further urged (appellees' additional brief in reply, p. 2) that lieutenant-governors had the power under the Spanish system to make grants. The Missouri cases cited to that effect all turn, however, upon the fact that there the lieutenant-governor was also a subdelegate, and by virtue of this office, not that of lieutenant-governor, he was authorized to make inchoate grants (*United States* v. *Chouteau*, 9 Pet., 137; *Delassus* v. *United States*, 9 Pet., 116). Indeed, the

cases just cited show that the lieutenant-governor made the concessions, "*by direction of the governor-general*, at a time when the power of granting land was vested in the governors of provinces." It seems sufficient to say that none of these powers are shown to have existed in the present case. If there was in 1790 a lieutenant-governor of New Mexico at El Paso del Norte, there is no evidence that he was a subdelegate or that he was authorized by the governor to make the grant. The burden of showing such extraordinary powers rests upon claimants. As was said in *Whitney* v. *United States* (181 U. S., 114):

> In that case (*United States* v. *Ortiz*, 176 U. S., 422) it was held that under the provisions of the act establishing the Court of Private Land Claims the burden of showing the existence of the grant was upon the person claiming under it, and that no presumption of authority on the part of the granting officer existed, as in the case of the above-mentioned Territories. This last case was approved in the *Elder case* (177 U. S., 104), where it was again held that the claimant must prove his title by a preponderance of evidence and no presumption of an authority existed.

5. Even if presumptions of power to grant could be entertained under the act of 1891, no presumptions can be indulged upon the present record. The utmost to which this class of presumptions has been extended is as stated in *United States* v. *Clarke* (8 Peters, 452), where it is said that the acts of an officer to whom a public duty is assigned by the King, *within*

the sphere of that duty, are *prima facie* taken to be within his power. The much quoted case of *Strother* v. *Lucas* (12 Pet., 437) goes only to this extent and no further. In that case a grant made by the governor was held good, despite a contrary order from the Crown, because the governor ordinarily had power to make a grant (*United States* v. *Clarke*, 8 Pet., 452–453), and his act, being within the sphere of his duty, was taken to be within his power. Even upon this principle, however, the court was in that case almost evenly divided. The reasoning of that case, however, does not apply in the present case. Here it was not a governor, but a lieutenant-governor acting. No law can be shown to the effect that the making of a grant was within "the sphere of his duty," so that no presumptions obtain in favor of his acts in making a grant.

The rule appliable here is quite clearly stated by the supreme court of Texas in *Jones* v. *Muisbach* (26 Tex., 235), where it is said:

> But this presumption can never be invoked to sustain the acts of an officer outside of or contrary to the usual and well recognized functions and duties of his office. To do so would be to withdraw the acts of such officers entirely from legal scrutiny and constitute their own sense of duty as the sole criterion of their powers, and would in all probability sanction every usurpation of which such an officer might have been guilty. In fact the more gross the usurpation the more difficult would it be for those who should deny the validity of the act to show

> that he had been forbidden to perform it by superior authority. The correct rule, as recognized by this and every other court, unquestionably is that where an officer of well-known, defined, and limited powers performs an act at variance with or beyond the scope of his usual authority the burthen of proving the validity rests upon the party seeking to sustain it. Otherwise the party seeking to overthrow such a presumption would be forced to prove a negative.

6. It is said, however, on page 5 of claimants' additional brief:

> There never was a time when an intendente undertook to grant lands in New Mexico, nor was there ever a time when the governors therein and the *lieutenant-governor at El Paso del Norte did not exercise such right.* Of this the court must take notice.

Counsel produced not a single instance, however, of the making of a grant by a lieutenant-governor at El Paso del Norte, and it is not believed that such a grant can be found. During the writer's connection with this land-grant litigation, extending to several hundred grants in New Mexico and a number in Arizona, he has never found a grant purporting to have been made by a lieutenant-governor at Paso del Norte, or indeed a lieutenant-governor anywhere else, with the exception of four or five grants made in 1735 by Juan Paez Hurtado, lieutenant-governor of New Mexico, in the absence of Governor Cruzat y Gongora in El Paso. Upon every one of these last-named grants, however, is an indorsement of revocation in the same language,

made by Governor Cruzat; and in the several cases brought before the Court of Private Land Claims based upon these revoked grants a decree of rejection has invariably been entered. The opinion in the first of these cases, followed in all the others, is hereto attached as Appendix No. 1. It will be noted that the holders under these grants are stated by Governor Cruzat in his order of November 11, 1735, to be upon the same basis as those "who obtained lands of his majesty without legal title."

So far, therefore, from there being any customary exercise of the power of alienation by lieutenant-governors in New Mexico, that power, so far as is shown by the archives and papers presented to the court below in dealing with this subject, was *never* exercised by them except in a single year, by a single lieutenant-governor, and in that case his exercise of power was promptly repudiated by his superior.

Respectfully submitted.

JOHN K. RICHARDS,
Solicitor-General.

MATTHEW G. REYNOLDS,
Special Assistant to the Attorney-General.

WILLIAM H. POPE,
Special Assistant to the Attorney-General.

APPENDIX NO. 1.

In the Court of Private Land Claims, Santa Fe, New Mexico, August term, 1896.

ANASTACIO C. DE BACA ET AL. *versus* UNITED STATES. } No. 97. Barranca grant.

Opinion of the court delivered by Stone, associate justice, on September 5th, 1896.

This grant was made on the second day of March, 1735, by Juan Paez Hurtado, who represents himself in the granting document to be lieutenant-governor and captain-general of this kingdom, acting as governor in the absence of Senior Col. Don Geronimo y Gongora, governor and captain-general of this kingdom. Possession was given to the grantees, Geronimo Martin, and four others, on the ninth day of the same month and year.

At the foot of the granting document and report of possession is appended the following indorsement: "This grant of lands with the corresponding possession was revoked, note of which was taken in the Government book," and signed "Cruzat."

It is pleaded by counsel for the Government, as well as by the intervenor herein, appearing on behalf of the grantees of the Juan Jose Lobato grant, that the Barranca grant sought to be confirmed in this case is situated and wholly included within the boundaries of

the said Lobato grant, and which latter grant has heretofore been confirmed by decree of this court and the survey thereof made and approved, and this allegation is admitted.

On the part of the defense archive number 524 was admitted in evidence, which recites the order and proclamation of Governor Cruzat y Gongora revoking the grant made by the lieutenant-governor, Hurtado, which order is as follows:

Archive 524.

"In the city of Santa Fe, on the eleventh day of the month of November of the year one thousand seven hundred and thirty-five, I, Colonel Don Gervacio Cruzat y Gongora, governor and captain-general of this kingdom of New Mexico, said that whereas I ordered for good reasons which I had for the same the revocation of the grants of land made by Lieutenant-General Juan Paez Hurtado during the time I was making my visit to the jurisdiction of El Paso, and it having come to my knowledge that Geronimo Martin, a resident of the Villa Nueva de Santa Cruz, is building a house on the lands of the said grant ordered to be revoked, and which has been revoked for some months, and this being to the prejudice of the royal patrimony I ought to order, and I do order, that the said Geronimo Martin shall immediately stop the building of the said house under penalty of one hundred dollars in cash or in money exacted by summary process of law from the most available of his property, which sum I hereby apply in equal parts to the King's treasury and to the expenses of the judiciary, and he shall tear down all that he has built within eight days after he shall have been notified, and I direct that the said lands granted by the said lieutenant-general to the said Geronimo Martin, as well as those granted to others within the said time

and which have been revoked shall be published as crown lands and applied to the royal patrimony, and that the said Geronimo Martin shall be advised that if, with the said term of eight days, he does not tear down all that he may have built upon the said revoked grant all the buildings that he may have erected shall be overthrown and torn down at his expense, and he shall also suffer the penalty prescribed by law for those who obtain lands of his majesty without legal title. Wherefore I ordered all the alcaldes mayores of the jurisdictions in which said grants now revoked were made not to permit in any way or manner that the said grants of land shall be settled by those who obtained the said revoked grants; all of which shall be made public and notorious by the alcaldes mayores of the respective jurisdictions, and they shall place the certificate of the publication of the same at the foot of this order, and this having been done it shall be returned to the superior government where it shall be recorded in conformity with that which I ordered and provided. Thus I provided, ordered, and signed with my assisting witnesses in the absence of a notary public or royal, of which there is none in this kingdom.

Don Gervacio Cruzat y Gongora.

Gaspar Bitton.

Nicolas de Mastis.

In the Villa Nueva de Santa Cruz, on the thirteenth day of the month of November, one thousand seven hundred and thirty-five, I, Captain Juan Estevan Garcia de Noriega, alcalde mayor and war captain of this jurisdiction, in obedience to the foregoing decree, published it to the residents of the same, and to Geronimo Martin on the seventeenth, he being absent at the time down the river, and he having heard and understood, placed on his head and said that he obeyed it

humbly, and in order that it may so appear he signed it with me and my assisting witnesses on the said day, month, and year.

JUAN ESTEVAN GARCIA DE NORIEGA.
GERONIMO MARTIN.

Witness: JOSEPH GARCIA DE NORIEGA.
Witness: MIGUEL CE QUINTANA."

The Lobato grant was made in the year 1740, which recited that the land granted was at that time public domain, and the boundaries specified were the same as those designated in the former grant made to Cristobal Torres in 1724, and which was afterwards revoked in 1733 by Governor Cruzat y Gongora and the tract declared to be Crown lands subject to regrant. The Lobato grant was in consequence of some controversy regranted and confirmed to the grantee, Juan Jose Lobato, in 1744, by Rabal, then governor and captain-general of this province.

In support of claimants' title to the Barranca grant an extract from archive 1100 was introduced in evidence, being a certain proclamation of Don Tomas Veles Cachupin, then governor and captain-general, in the year 1750, reciting that as certain lands theretofore given to families of the villas of Abiquiu, Ojo Caliente, and Embudo had been abandoned and deserted by the inhabitants, they, the said former inhabitants, were directed to return to their lands and houses at once and proceed with the cultivation of their lands. This proclamation was made in February, and prescribed that the people should put in crops that "coming spring," and were to build houses, lay out streets and plazas in a certain designated manner for defense against enemies, etc., but there is no mention of any person or family by name, nor is there any description

of the location of the lands referred to other than the mention of the villas named, nor is there any evidence that such inhabitants complied in any respect with the governor's proclamation.

Another document put in evidence by claimants shows that in 1784 there was an acknowledgment by Juan Bautista de Anza, the then governor of the province of New Mexico, that Don Jose Martin, who is claimed to be a descendant of Geronimo Martin, one of the original grantees under the revoked grant, was entitled to the "ancient lands held by him," and that he and other interested parties were to be protected in "their ancient possession," and this acknowledgment was assented to by the Indians and citizens of the place, but there is nothing to indicate the locality or extent of the lands and possession referred to.

It was contended by counsel for claimants on the hearing that there was no law or authority for the governor to revoke the grant in question, except by a proper proceeding for denouncement.

We think that proceedings for denouncement were only employed in cases where the abandonment of lands granted or other failure of compliance with the conditions of the grant had been formally alleged and presented to the granting authority. In this case the grantee under the lieutenant-governor was in possession, and inasmuch as the governor on his return states in his order of revocation that "I ordered, for good reasons which I have for the same, the revocation of the grants of land made by Lieutenant-General Juan Paez Hurtado, during the time I was making my visit to the jurisdiction of El Paso," and further imposed upon the grantee "the penalty prescribed by law for those who obtain lands of his majesty without legal

title," it may fairly be inferred that the governor based his revocation upon the ground that the grant by his lieutenant was illegally or improvidently made.

We do not deem it necessary to discuss the question whether under a proper construction of certain provisions contained in the act creating this court we have jurisdictional authority to confirm a grant lying within the boundaries of another grant which upon full hearing has been previously confirmed by this court.

It is to be remarked that there is a noticeable difference between the provisions of the act establishing this court and the provisions of the act of 1851 establishing the California commission touching the jurisdiction respecting conflicting titles, and it may well be doubted if the confirmation of the Lobato grant did not determine the title to all the area embraced within its boundaries and exhaust the jurisdiction of the court therein, except as to the Abiquiu and Plaza Blanca grants, which were not opposed by the claimants under the Lobato title.

For the reasons above expressed, the claim in this case is rejected and the petition ordered dismissed.

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No. 211.
Brief of Appellees
Br. of Catron for Appellees

Office Supreme Court U.S.
FILED
MAR 10 1902
JAMES H. McKENNEY,
Clerk.

Filed Mar. 10, 1902.

Supreme Court of the United States.

OCTOBER TERM, 1901.

No. 211.

THE UNITED STATES,
Appellant,

vs.

M. R. PENDELL *and* J. ESCOBAR,
Appellees.

BRIEF OF APPELLEES.

T. B. CATRON,
Attorney for Appellees.

In the Supreme Court of the United States,

OCTOBER TERM, 1901.

THE UNITED STATES,
Appellant,

vs.

M. R. PENDELL and J. ESCOBAR,
Appellees.

This is an appeal by the United States from a decree of the Court of Private Land Claims, rendered for the confirmation of a grant to a tract of land known as the Santa Teresa Grant, consisting of four sitios, or four leagues of land, situate in Dona Ana County, New Mexico, and with the Gadsden Purchase.

It is alleged in the petition in substance that in the latter part of the eighteenth century the Spanish authorities at Pasa del Norte, in the State of Chihuahua, Mexico, granted to Francisco Garcia, a tract of land called Santa Teresa, containing four leagues or sitios, described as designated in the proceedings *ad perpetuum*, had in that city and the act of repossession given thereunder by the second Judge of the first instance, on January 16th, 1853 (Trans., pp. 9, 16).

It is also alleged in the petition for confirmation and Exhibit A filed therewith, that the muniments of title and official record thereof, were destroyed by

the American troops when they occupied Paso del Norte in 1846, or 1847;

That, in order to perpetuate the evidence of title of said land, José Maria Garcia, an heir of the original grantee, and executor of the estate of his mother, the wife of the original grantee, did, on January 7th, 1853, apply to the proper judicial authority at Paso del Norte, and asked for a revalidation of said title in accordance with the customs of Mexico; and that the evidence of certain witnesses mentioned in his application might be taken on certain interrogatories therein contained as to the occupation and possession of said land, its boundaries and existence of a grant or original muniments of title, *in order to supply in some manner the lack of the original muniments;* and that the judicial investigation thereon having been concluded, and there resulting thereby the establishment of the original boundaries, the said Judge of the first instance should give to him the possession which by law corresponded to him in the name of the Garcia heirs, his brothers and sisters; and that in such possession he should order them to be protected and defended without being disturbed or molested by any one, unless heard in court, in order that such possession *might serve them and their heirs as title and security* (Trans., Exhibit A, pp. 3, 4, 10 and 11, for the Petition made by J. M. Garcia to the second Judge of the first instance).

The said petition of said Garcia so made January 7, 1853 being a petition in fact to perpetuate the evidence of title and quiet the same in him and his co-heirs.

The said petition of José Maria Garcia was admitted by Bentura Lopez, the second Judge of the first instance, January 9, 1853; and the witnesses named therein were ordered to be cited to appear before him on January 11, 1853 (Trans., pp. 4 and 11).

On January 11, 1853, the witnesses named each appeared and were duly sworn, and gave their answers to the interrogatories (their answers will be

found in the Transcript in Plaintiff's Exhibit A, introduced in evidence on pp. 5, 6, 7, and 8 in Spanish, a translation of which, which is incorrect in part, will be found in the transcript at pages 12, 13, 14 and 15).

The principal incorrectness in the translation will be found in the answers of the witness, Franco Rascon, in Spanish, page 5, and the pretended translation on page 12.

A correct translation of the answer of said Franco Rascon, to the said third interrogatory propounded to him, is as follows:

"Interrogated in regard to the contents of a third interrogatory, he said: "That many times he had had in his hands the possession of the original documents (Documentus primordilas) of the Santa Teresa ranch, executed by one of the Lieutenant-Governors, who governed in this district about the end of the last century; that by reason of his father having been an official employee (empleado) in this village, a little after the year 1821, he saw the possession of said rauch registered (protocolisada) in the Archive (Archivo) of his father's office, and that, although he does not remember the date, yet he can affirm that said possession was from three to five leagues, which documents he knew were lost when the American troops took possession of the Archives of this town and occupied the house of José Maria Garcia; that the aforesaid is the truth in reference to the interrogatories which had been made to him, which he affirms and ratifies on the faith of the oath he has taken, signing it with the Judge and assisting witnesses.

I certify

FRANCO RASCON.
BENTURA LOPEZ.

Assisting witness:
FRANCISCO BARRON.
Assisting witness:
FELIZ LERMA."

The other answers of the said six witnesses contain some inaccuracies, but are not so radically wrong as to make any very material difference.

The said Franco. Rascon also testified in answer to the second interrogatory, that, from the year 1813, he had known the ranch of Francisco Garcia, called Santa Teresa, because he had been there several times before it was abandoned on account of the incursions of the Indians; that, when he came to town, he had heard trustworthy persons say that the Santa Teresa ranch was an old property of Francisco Garcia, whom he sometimes saw on said ranch with his servants and herds.

The next of said witnesses was Guadalupe Miranda, who, in answer to the second interrogatory stated "that it had been notorious in that town that, for some years the deceased, Francisco Garcia, and his children, possessed and occupied with their herds the Santa Teresa ranch."

And to the third interrogatory, "That he had been informed by trustworthy persons that they had seen some documents of such possession; that it is a notorious fact that, at the time of the occupation of this town by the American forces, said forces destroyed (destruyeron) a part of the public Archives; that they occuped José Maria Garcia's house, from which they took some documents relating to his property, and papers of importance, among which it is assured were the documents of said ranch, which ranch, according to his recollection, he was informed, comprised a body of four leagues."

The witness, José Maria Maese, in answer to the second interrogatory, stated: "That he had been at the Santa Teresa ranch several times; that it belonged to Francisco Garcia. * * * That, when he was very young, he had heard it said by respectable old persons that the said Francisco Garcia had had his stock on said ranch since about the latter part of the last century."

In answer to the third interrogatory he said: "That he remembered to have seen the title papers

of the Santa Teresa ranch, given by the Lieutenant-Governor of this town during the time of the Spanish rule; that he does not remember the date of said documents, but he is certain that they comprised a donation of four leagues; that it is notorious that the American forces, and also the Mexicans, abstracted a part of the Archives of this town in the year 1847 and 1848, and also that the Americans occupied the house of José Maria Garcia from whom they took some important papers, and he knows from credible persons that in said years the Messrs. Garcia lost the documents they had relating to Santa Teresa."

The witness Alejo Martinez, in answer to the fourth interrogatory said: "That he had served for more than twenty years in the family of the Messrs. Garcia, in different capacities, for which reason he was for some years, prior to 1820, on the Santa Teresa ranch, where the Messrs. Garcia had their herds of horses and large and small stock."

In answer to the fifth interrogatory he said: "That he knew the several adobe buildings of the principal house of the ranch of Santa Teresa, the corrals, and the shanties built of poles for the servants; that it was well known and notorious that one of the boundaries is in the lower bend of the Piedras Paradas; that, on the lower side, the river served as a boundary line; on the north side, the boundary line crossed the Cobrena Bend, and on the side of the plain, the ridge (ceja); that the ruins of the houses and corrals are still plainly to be seen, and that he can point them out; and that, although it is many years since he has been to the place, he believes he can yet designate the boundaries formerly recognized."

The witness Jose Abalos, in answer to the fourth interrogatory, said: "That he had served for more than ten years the family of the Messrs. Garcia in different capacities, for which reason he had for some years, prior to 1820, lived at the Santa Teresa

ranch, where the Messrs. Garcia had their herds of horses and large and small stock, of which deponent was a shepherd."

To the fifth interrogatory he said: "That he knew the several adobe constructions of the principal house of the Santa Teresa ranch; the corrals, and shanties, built of poles, where the servants lived, and in which the deponent also lived; that it was well known and notorious that one of the boundaries is the lower bend of the Piedras Paradas; on the lower side, the river served as a boundary line; on the north side, the line crosses the Cobrena Bend, and on the plain, the brow (ceja); the ruins of the houses and corrals are still fairly to be seen; that he can show the same, for he knows the place well, and all the boundaries of the Santa Teresa ranch."

The sixth and last witness examined by the second Judge of the first instance on that occasion was Julian Alday, who, in answer to the fourth interrogatory, said: "That he had served for more than twenty years the family of the Messrs. Garcia in different capacities, and for that reason had served on the ranch of Santa Teresa, where the family of the Messrs. Garcia had their herds of horses and large and small stock."

To the fifth interrogatory he said: "That he knew well the several adobe buildings of the principal house of the Santa Teresa ranch, and some shanties built of poles in which the servants lived; that it was well known and notorious that one of the boundaries is at the lower bend of the Piedras Paradas; on the lower side, the river served as a boundary; on the north side, the line crossed at the Cobrena Bend, and on the side of the plain, the brow (ceja); and that the ruins of the houses and corrals are still plainly visible; that the deponent can point them out, for he knows them very well."

On that petition and evidence taken, the said Bentura Lopez, as the second Judge of the first in-

stance, at Pasa del Norte, made a decree in words and figures as follows (Translated, p. 15):

"In view of the foregoing judicial inquiry with which the executor José Maria Garcia, *has proved legally the possession, that for many years they have had* of the ranch called Santa Teresa, above the dam of the town and the Molares Bend, and it *appearing that they have even had titles to said property*, and these have been lost, and from what appears, from the testament and judicial inquiry, there is given to the executor José Maria Garcia, for himself, and in the name of the co-heirs, without prejudice to any third party, proving a better right, the real, actual, personal, corporal possession, or, *that which better corresponds in law, by reason of immemorial possession, of the Santa Teresa ranch*, with the enjoyments and benefits of the *lands, woods* and *pastures, and all other products, to be found on said premises, and it is ordered that he be protected and defended therein, warning all not to interrupt or molest him in said possession and free use, that he may deem fit to make thereof*, without he being first heard and judgment rendered against him in court, after trial; and for the fulfillment of this mandate, the said José Maria Garcia will on the 16th day of the current month repair to the tract of land designated with the judge and witnesses, taking with him one or two persons who can point out the old boundaries. The second judge, and of the first instance thus decreed, directed and signed with the assisting witnesses. I certity

BENTURA LOPEZ.

Assisting witness:

FRANCISCO BARRON.

Assisting witness:

FELIZ LERMA."

(Trans., pp. 8, 15 and 16.)

Afterwards, on the 16th day of January, 1853, said Bentura Lopez as 2nd judge of 1st instance of

Canton Bravos, at Paso del Norte, accompanied by his assisting and instrumental witnesses, and by said José Maria Garcia, and said witness, Alejo Martinez, went upon the tract of land and marked the boundaries as shown by the witness as being the old boundaries, and which are described in the return made by said judge, found on pages 8, 9, 16 and 17 of the transcript, and in said return he stated, near the end of it: "and in testimony of true possession I led the executor, José Maria Garcia by the right hand upon the four leagues which are contained within the measurement executed, and within the old boundaries which were pointed out to me; I led him over them, *and I directed him to make those who were on the said premises leave them;* and in this possession *I ordered that he and his co-heirs and successors be protected and defended, so long as judgment be not rendered against them by a court after a trial;* and ordering that there be imposed upon those who may interrupt him in his possession the penalties of the law; with which proceeding this measurement was ended, there resulting therefrom the configuration of the land as is shown by the map attached to this possession (Exhibit B, bet. pp. 16 and 17). I also directed that there be given to the party in interest such copy of these proceedings as he may solicit, placing in the archives of my office the originals."

All of the foregoing proceedings are contained in Plaintiff's Exhibit A, filed with his petition in the Court of Private Land Claims, with which the translation made in the Surveyor General's office are also copied as a part of said exhibit.

Upon the trial of said cause, all of the original papers mentioned in said Exhibit A were introduced in evidence by plaintiff, also in the said trial there was introduced in evidence by plaintiff the testimony of various other witnesses taken in said cause, to wit, Juan Abelos, p. 22; Pedro Melenudo, p. 35; Pedro Balisan, p. 48; Gregoria Herrera, p. 52; Jesus Velarde, p. 61;

Vicente Garcia, p. 72; Jesus Enriques, p. 81; Eugene van Patten, p. 89; eight witnesses in all, and also the evidence of two other witnesses taken by direction of the Surveyor-General of New Mexico; to wit, Clemente Nanes, p. 113; and Maximo Castanado, p. 114, all of whom testified as to the occupation and possession of the lands in question by Francisco Garcia and his heirs, and as to the location of the boundaries, making, with those in Exhibit A, sixteen witnesses to that effect.

Also, the plaintiffs introduced as witnesses Sostenos Roderigues, p. 68, and Solomon C. Schulz, p. 69, both as to the record of the original of Plaintiff's Exhibit A, in the Archives at El Paso.

Also, Samuel B. Bean, an old soldier, of Doniphan's Expedition in the Mexican war, as to being quartered in the house of Jose Maria Garcia, adjoining the room in which the Archives of Paso del Norte were kept, and connected therewith by an unlocked and open door, and as to the use and destruction of said Archives by said American soldiers quartered there.

It was also stipulated (p. 144) that M. R. Pendell, the petitioner (plaintiff), has succeeded at least to a portion of the interest held by Francisco Garcia in the said property, which it was admitted therein was sufficient to authorize him to invoke the jurisdiction of the Court in said cause.

And also, that the Plaintiff's Exhibits from 5–11 might be omitted from the Transcript.

The Government only introduced some documentary evidence, and two witnesses as to the location of natural objects, showing the boundaries; but nothing which tended to contradict the evidence introduced by the plaintiffs. The Court of Private Land Claims rendered a decree confirming the grant (Trans., pp. 212–215), the opinion as to the same being rendered by Justice Sluss, with whom the Chief Justice and two associates concurred (pp. 139, 140 and 141). Justice Murray alone dissented.

The decree of the Court finds that, prior to 1790,

on the petition of Francisco Garcia, the authorities and representatives of the Kingdom of Spain, by virtue of the power in them vested, and in accordance with the laws, usages and customs of said Kingdom, made to Francisco Garcia a grant of the tract of land in question; that Garcia was duly placed in possession thereof, and the same continued in his possession, and that of his heirs and legal representatives and assigns, from prior to 1790 to the present time; and that the petitioner had succeeded in part to the rights of said grantee. And, that, by reason of said facts an imperfect or equitable title and right, such as the United States under the treaty ought to recognize and confirm, to said land, was vested in said original grantee aforesaid, which right existed at the time the United States acquired sovereignty over that portion of country where the grant is situate, and that the petitioners are entitled to have the grant confirmed to the heirs, representatives and assigns of said grantee; and that the said private land-claim is a valid claim against the United States for the said land, and that the same be thereby confirmed, as therein designated and bounded.

ARGUMENT AND AUTHORITIES.

It will be seen the Court of Private Land Claims finds there was a grant of the land in question, duly made, prior to 1790, and that it has been possessed by the grantee, his heirs, legal representatives and assigns to the present time. To wit: 110 years, and 64 years prior to the treaty of Gadsden.

What is the evidence of this grant? It consists in the record of proceedings had before the second judge of 1st instance in January, 1853, to perpetuate the evidence of the grant made in the 18th century, quiet the title thereof, and to have the same

again formally placed in his possession, with all the boundaries made certain and a record made thereof so as to "serve them as title and security" to the same; also evidence of long and immemorial possession thereof—over 110 years, and over 64 years before the treaty of Gadsden.

Those proceedings are a matter of record in the Archives of Paso del Norte. Said possession supplies the absence of the original grant papers and record. They contain the evidence that the grant was made, and the evidence that the grant was in existence and in the Archives. Those proceedings being of record complies with what was contemplated by the 6th Art. of the treaty of Gadsden, which says: "Nor will any grants made previously (to September 25, 1853) *be respected or considered as obligatory* which have not been located and duly recorded in the Archives of Mexico."

What do those proceedings, which are inserted in full (Plaintiff's Exhibit A), show as evidence of a grant?

The 2nd Judge of 1st instance finds therein that they showed at the date thereof that Jose Maria Garcia, executor, etc., had proved (justificado—better translated, established or justified)—legally the possession that for many years they had had of said ranch; that it appearing that they even had titles to said property, and those have been lost.

And that, from what appears from the will and said proceedings, "there is given" to the executor, Jose Maria Garcia, for himself, and in the name of his co-heirs, without prejudice to any third party, proving a better right, *the real, actual, personal, corporal possession* or, *that which better corresponds in law, by reason of immemorial possession of the Santa Teresa ranch, with the enjoyments and benefits of the lands, woods and pastures, and all other products, to be found on said premises; and that he be protected and defended therein, warning all not to interrupt or molest him in said possession, and free use that he may deem fit to make thereof.*"

This is the solemn finding and decree of a court of a foreign country of competent jurisdiction in a legal proceeding pending before it.

It has always been held that the acts of officers of a foreign country done in the line of their authority, are presumed to be legal and according to law.

This proposition is so well established that a citation of authorities is unnecessary.

This Court cannot question that finding. If it could, still there is evidence in said proceedings, fully to justify the finding and decree.

An examination of the evidence of Franco Rascon, the first witness in that proceeding, in his answer to the third interrogatory, will be sufficient to satisfy the Court as to the propriety of that finding, especially when considered in connection with the accompanying fact of long and immemorial possession (which must always, when existing, be considered when determining as to the existence of documentary title).

The evidence of said first witness, Franco Rascon, p. 5, when properly translated alone shows beyond question the correctness of that finding. It there appears said witness Rascon "*frequently*" *had in his hands the original* (*primordial*) *documents* of the ranch, executed (autorizado) by a Lieutenant-Governor in that country; that his father had been an official, or public employee ("empleado") in Paso del Norte, a little after 1820; *that he saw in the Archives* (archivo meaning depository of public papers) of his father's office, filed or made into a protocol (protocolisado) the possession(meaning said documents) of said ranch previously referred to.

Here is a plain, clear statement of the existence of the grant in the public records, or Archives at that town. It will be noticed that the word "Archivo" (Archives) is spelled with a capital A, denoting something certain and particular, such as a proper name, which could only refer to the thing generally known as an Archive, belonging to the

public, or something of a conspicuous character, distinct from a private character, or private papers.

The word "Archivo" is translated both by Lopez & Bently and by Velasquez in their English and Spanish dictionaries, as "Archives, the place where public records are kept." The Century Dictionary defines archives as—"The place where records are kept—the records themselves; place where public records or other historical documents are kept." Both Lopez and Bently and Velasquez define the word "empleado" (translated in Ex. A as employee) as meaning "Placeman, one who exercises or fills a public station and who enjoys a salary from the Government." The word "protocolisado" is also defined by them as "being made into a protocol, such as a notary's record," &c.

That witness in his testimony says that the said title papers were lost when the Americans took possession of the "Archives of the town," and occupied the house of José Maria Garcia. This witness, without doubt, in speaking of the loss, referred to the originul documents of the ranch which he had had in his hands "frequently" in the "Archives" of the office where his father was a public employee. He designates the Archives as being the Archives of the town, and it was there he saw them, filed or registered (protocolisado), and it is these which he says were lost. This evidence must have been understood by the 2d judge of the 1st instance, being a Spanish-speaking officer, and it being given in his own language; and his opinion or finding was made up from that evidence. The evidence of that witness, however, in the Court of Private Land Claims, is corroborated by the evidence from S. B. Bean, p. 70, one of the American soldiers, who says they occupied a room in Jose Maria Garcia's house, adjoining the public archives, into which there was a door unlocked and open. He says that the boys frequented the room of the Archives and destroyed the papers of the Archives outrageously; a great many of them; that

they used to tear them in pieces; the more damage they could do to them the better. From his evidence, it appears that the Archives were either in Garcia's house, or in a room immediately adjoining it and connected with it by an unlocked and open door through which the American soldiers had free access, and where they went and destroyed a great many of the papers, which he understood to be *public records or archives.*

It appears from the evidence of the first three witnesses in those proceedings that, not only were many of the Archive papers taken and destroyed, but also the papers of Jose Maria Garcia, including the documents he had with reference to the ranch in question. But, the witness, Rascon, says the original (primordial) documents were in the Archives, and that they were lost at that time, and this is, in effect, so found by the judge of the 1st instance. He says in his findings that Garcias "even had titles to said property, and these have been lost," this means title of documentary or record character; it means something complete and definite, and not incomplete or indefinite; it means that the titles of the Garcia's had all of the requisites and formalities of a complete, valid, legal and binding title from the commencement, vesting the property absolutely in them, something different from long or immemorial possession, which also makes title, which, he says, is "still better."

Although Justice Murray in his dissent says: "It was not necessary, under the laws of Spain and Mexico, in order to vest the grantee with a valid or legal title, that the grant should be recorded in the Archives." We respectfully differ with him in this statement. It was the general requirement and practice, both in Spain and Mexico, in making grants for land, to make an original copy, which was sometimes called the matrix, and to form out of a collection of all the original papers an expediente, which was deposited (protocolisado) in the

Archives, and that took the place of a record or register, and is exactly what was meant by the word "protocolisado" used by the first witness, Franco Rascon, in speaking of the papers, which he "frequently" had in his hands in the archives of his father's office.

If this witness had not meant that those were public archives, or public papers, but were private papers in the house of Garcia, he would have said that his father was a dependent or clerk of Jose Maria Garcia and that the papers he had in his hands were among the papers of Jose Maria Garcia in his house, where his father was occupied, and not used the language contained in his evidence.

The next step towards making a grant, which was in no manner necessary to the validity of the grant of land, was the preparing of a testimonio, that is, a certified copy of the *expediente*, which was to be given to the grantee, and was to serve him as his evidence of title. This was almost the universal practice; sometimes, however in New Mexico, the testimonio was placed in the archives, and the original (*expediente*) given out to the grantee. This was evidently done by mistake, but it was never considered to be a vital error, but it was the universal rule to always leave a copy, generally the original, in the archives. Sometimes, when such original or record copy has been missing, the same has been supplied or accounted for, by showing a long, continuous, open, notorious and adverse possession of the property under a claim to the same by virtue of the grant, most generally, the copy in the hands of the grantee, or accounted for. This simply presumed a grant to the property which had been duly deposited in the archives and lost.

This Court have constantly rejected grants simply because there was no record of them, and no sufficient long, continuous adverse possession, such as to invoke the presumption of a record; and, on the other hand, they have frequently confirmed grants

of which there was no record evidence, when open, long, continuous, notorious and adverse possession was shown for as much as a period of twenty years, much less than the possession shown in this case.

Here, however, we have direct proof of the existence of the grant papers, in the Archives at Paso del Norte, of their loss, or destruction through the instrumentality of the American troops, and of the loss of a large portion of the Archives of that town, and also of the papers of Jose Maria Garcia, in whose house the Archives were either kept, or were kept in a room adjoining thereto, which communicated with his house by an unlocked and open door, where the American troops were quartered, and where the soldiers frequented, who destroyed or carried off his papers as well as a large quantity of the Archives.

The evidence shows not only the loss of the papers which Jose Maria Garcia may have had individually, in regard to this ranch, but the actual loss from the Archives of the original thereof, which was therein deposited. This is incontrovertible.

To this evidence we must add that upon which the Mexican Court made the finding that the Garcia's had proved or established legally the possession, that for many years they had held possession of the ranch, and that it appeared they even had titles to the property, and those had been lost, and that which better corresponded in law, by reason of immemorial possession of said ranch. This is a finding, first, of possession for many years; second, of actual titles to the property; third, of immemorial possession thereof, which the Court says is better than a title, and which must mean that it carried everything and included everything to make a complete and perfect title to said land.

The Land Court based its judgment, not only upon the actual existence of a grant, made prior to 1790, but upon the long possession, proven for fully

one hundred and ten years, and as much as sixty-four years before the treaty.

The opinion of the Court in the case rests upon the law as laid down in United States *v.* Chaves, 159 U. S., 542, where the Court say:

"It is the general rule of American law that a grant will be presumed upon proof of adverse, exclusive and uninterrupted possession for 20 years, and that such rule will be applied as a *presumptio juris et de jure, whenever by principle a right may be acquired in any manner known to the law.* * * * Nothing, it is true, can be claimed by prescription which owes its origin to and can only be had by matter of record; but, *lapse of time, accompanied by acts done, or other circumstances, may warrant a jury in presuming a grant or title by record.* * * * If the adverse claim could have had a legal commencement, juries are advised or instructed *to presume such commencement, after many years of uninterrupted possession or enjoyment.*"

The foregoing decision was reaffirmed in United States *vs.* Chaves, 175 U. S., 523; and it is on this case that the Land Court particularly relies to support its decree. The Court says therein:

"The principle of the cases is not *limited or satisfied by the prescription of only one step in the title. It requires the presumption of all that may be necessary* to the repose of the title; to the absolute assurance and quietude of the possession."

The Court proceeding, quoted therein with approval from the Supreme Court of Tennessee, 2 Head, 697, this statement of the law, to wit:

"There is hardly a species of act or document, public or private, that will not be presumed in support of possession, even Acts of Parliament may thus be presumed, as also will grants from the Crown."

The Court then proceeding stated:

"The possession of the land began in wrong or it began in right. *If in wrong, it must be shown.*"

This Court also in Ely's Adm. *vs.* The United States, 171 U. S., 233, say:

"While, of course, time does not run against the Government and no prescription may be affirmed, perhaps, in favor of the validity of this grant, yet the *inaction* of the Government during these many years is very persuasive, not merely, that it conceded the intendant had the power to make the sale, but that, in fact, he did make the sale under such power."

It will be seen by these decisions that even if there was no actual documentary evidence of a grant, yet the open, notorious, continuous, adverse, possession of the tract under the claim of title by grant for twenty years or more would invoke in favor of the claimant the presumption of the existence of a grant, and not only that, but a presumption of the existence of every fact necessary to make a valid and complete grant including the requisite or necessary record thereof. The Chaves case, 175 U. S., 523, distinctly holds such to be the law, and also that in such case if the grant *commenced in wrong, the burden was upon the Government to show the wrong.* The Government has not attempted in this case to show the absence of a record or that the possession commenced in wrong.

According to these decisions, which certainly were and are a rule of practice and of evidence to us, as well as a rule of property, the long possession, for sixty-four years, prior to the promulgation of the treaty, and 110 years prior to this date, is sufficient to establish *every essential element of a grant to the land in question.* The question involved in the dissent of Justice Murray, that no record is shown, is directly met by the decision in 159 U. S., p. 542, where the Court say:

"Nothing, it is true, can be claimed by prescription, which owes its origin to, and can only be had by matter of record; but lapse of time, accompanied by acts done, or other circumstances, may warrant a jury in presuming a grant, *or title by record.* * * *

If the adverse claim could have had a legal commencement, juries are advised, or instructed, to presume such commencement, after many years of uninterrupted possession or enjoyment."

Justice Murray seeks to escape from that decision by saying, a legal grant did not require a record, to be legal, therefore it had a legal commencement. That is merely begging the question. If a grant could be made legal without ever making any record, except the matter was prevented, like that in the Fremont case, 19 How., by a change of sovereignty very soon after the grant was made, is it to be presumed that the Mexican Government, knowing such fact that its citizens might hold valid titles of long standing by way of legal grants which were not on record, would have destroyed such titles of its citizens by agreeing that, although there might be such legal grants, which had not been registered, yet such should be "invalid and not recognized by this Government, to which it was transferring them. If there were legal grants and of long standing, without a record which were valid, certainly the Mexican Government would have preserved the rights of its citizens therein by providing a time for their record within a given period thereafter, if the treaty otherwise was to annul them, and would not have consented to the arbitrary confiscation of their property for the benefit of a foreign Power as is insisted by the attorney of the Government.

It may be asked why incorporate that provision in the treaty? It was intended, without doubt, if it means what Justice Murray claims it does, to operate upon grants of recent origin which had not been perfected. The provision is, first, that grants made subsequent to September 25, 1853 (perfect or not) should not be "considered valid or be recognized by the United States." The second provision is that those made prior and not located and registered should not "be respected or be considered as obligatory." This evidently intended to refer to

grants which might have been made shortly before the treaty, and in which the granting decree had been made, as in the Fremont case, 19 How., but for some reason juridical possession had not been given so as to properly locate and define the boundaries of the property and of which no record has been made, because the officer who should give the juridical possession had not been able to do so or had neglected or failed to return the same to the Archives. Such grants as that would not be affected by long-continued possession because there would be no such long possession; but if a grant should have been made fifty or a hundred years before, and the grantee and his legal representatives should have remained in continuous, adverse, open and notorious possession during the time claiming under the grant, although no record could be found, and the Government had remained inactive and tacitly acquiesced in the possession a complete and valid grant, including a record under these decisions, would be presumed. The record would be presumed from the fact of the inaction of the Government, and that it had acquiesced in the possession of the claim and land during all that time, as alleged in the Ely case, 171 U. S., 233.

International law provides that, on the change of sovereignty, property rights remain undisturbed. No government can be presumed to sacrifice, in the face of this principle, the rights of its citizens, arbitrarily, especially without force being used to compel it. It must be construed, if possible, to harmonize with international law; if it does not, it must be strictly construed. If a grant could be presumed at the date of the Gadsden treaty, in 1853, by virtue of long-continued, adverse, immemorial possession under claim of right, and the inaction of the Government and acquiescence, everything else could be presumed which was necessary to make such right complete, then the principle of international law will compel that property to be respected under the treaty, as complying with the law and as being un-

changed in its right; everything will be presumed in favor of such right of property necessary to make it complete and perfect. No such state of fact exists in this case as would require this grant to be forfeited; that could only be done in case of an incomplete grant of *recent date* at the time of the treaty. A grant might be made shortly prior to the treaty, yet possession not delivered. The officer in such case may not have filed the papers in the Archives, the grant may never have been located; in such case there could be no presumption, because there would not be sufficient time of possession.

Even if the grant had not been recorded, and there could be no presumption from the possession that it was recorded in the Archives, as originally made, yet does not the legal proceeding to perpetuate the evidence thereof, when the same is shown to be lost, takes its place, and stand as evidence of title? If those proceedings are recorded, or deposited in the Archives, is that not sufficient? What was required to be recorded? It was only the documentary evidence of the grant having been made. They are not the grant, but only the evidence of it. When the grant was required to be recorded, it was only the documentary evidence to show it. The legal proceedings perpetuating the evidence of that fact, become evidences themselves of the fact and take the place of those they perpetuate; they were recorded as the evidence shows; they established the existence of the grant, its boundary, limitation and extent, and everything that was required in good faith to notify this Government of the existence of the grant and of the title of claimant and his assignors, and what this Government should respect. We insist that the claimants have shown a substantial compliance with the requirements of the law and the treaty. In fact, also by establishing a presumption by long-continued, adverse possession which must be recognized as controlling.

An examination of Section 6 of the law will show that it is not only grants which may be confirmed, but any concession, warrant or survey of the land, such as the United States is "bound to recognize" are to be looked into and confirmed, if valid. Is not this in one sense a survey of the land in question by a judicial authority, by which the land is located exactly as to quantity and boundary, and the title thereof established and set at rest, and a decree rendered that it is held by a title from the Spanish authorities, and that the holding shall be protected and defended, and no one shall molest or disturb it, except after trial in court and on judgment rendered? Could there be a stronger case of the actual existence of a grant, and of its record and of its possession under a claim of title by grant, where the original grant was lost? Could better faith be shown than has been shown in this case?

Section 6 of the treaty provides that only grants made after September 25, 1853, will be considered invalid and not recognized; but that grants made before that date shall not "be respected or be considered as obligatory," but does not say they will not be considered valid, or not recognized as in the first part of the Section, where they were made after September 25, 1853.

Assuming, for the sake of argument, that there is no record in the Archives of the original grant of the land in question which has been sufficiently proven, yet it is apparently conceded that, in any event, the grant in question should be confirmed, unless the 6th clause of the Gadsden treaty prohibits it. This concedes that, prior to the treaty, Garcia had a legal and valid right and title to the property, good under Mexico and against that Government. If that clause of the treaty would forfeit or confiscate claimants' legal and valid right and title in the property, it is in derogation of international law, common law and civil law, and must be strictly construed. If a construction can be had which will avoid a forfeiture, that must be made.

That clause contains two provisions, one referring to grants made after September 25, 1853, which "will not be considered as valid or recognized"; the other, that grants made prior to that date, if not located or duly recorded, in the Archives of Mexico, "will not be respected or *be considered as obligatory.*"

This implies that all grants made prior to September 25, 1853, which *had been* located, and duly recorded in the Archives, should be respected as obligatory, and be considered as obligatory, and that no objections could be made to them.

The first provision makes the grants absolutely invalid. If such was to be the effect of the second provision, applied to unlocated and unrecorded grants, why use different language than that used in the first; or place them in a different class? Why not use the same language, and a single classification?

Evidently some difference was intended. What is it?

FIRST, that grants made after September 25, 1853, were *invalid.*

SECOND, that grants made prior to September 25, 1853, and located and duly recorded were unquestionably *valid.*

THIRD, grants made prior to September 25, 1853, and not located and duly recorded were to be considered as imperfect, and this Government was not *obligated* to respect or consider them.

There is no punctuation mark in the treaty after the word "respected" so as to separate it from connection with the word "considered," as bearing upon the word "obligatory;" and the clause should be construed as if it read "nor will any grants made previously be respected as obligatory, or considered as obligatory which had not been located and duly recorded," &c.

In the first case, the grants are made invalid. In the second, they are made valid. In the third, they are left as inchoate, or imperfect grants; the Government can repudiate them, or recognize them. It is left to the Government to take the bit in its mouth and confiscate the property of an individual arbitrarily which has been acquired and held in good faith, or confirm it. What is the moral and legal duty of the Government? Should it ignore all law, international, common and civil, and all right, and violently appropriate to its use the property of an individual acquired and held in good faith by a valid title under a former Government? It seems that José Maria Garcia migrated into, and doubtless became a citizen of the United States. Very probably with the change of sovereignty over that territory. He at least followed his property and stayed with it. Surveyor-General Julian, page 137, says: "The facts would establish a pretty strong equitable claim if not a legal one; but for the 6th Article of the Gadsden treaty." * * * He then says: "As I understand it, no grant of land, comprised within the territory covered by this treaty can be recognized by the United States as valid, whether the date be prior or subsequent to the time specified, unless the grant shall have been duly recorded in the Archives." He thus construes both provisions of that clause as having the same effect. He does not consider or allow the use of different language in different terms as conveying different meanings. Justice Murray, in dissenting, misquotes the treaty, but takes the same position as that taken by General Julian. Neither of them drew any distinction between the language used as to grants subsequently made and that used as to those previously made, where there had been no location or record. The first of those provisions makes the grant absolutely invalid; the other only provides the United States shall not be obliged to respect or consider it, and leaves them free to do in regard to it as they may deem just and right.

This being the case, by the treaty, if the grant is not shown, or presumed to have been recorded, it stands, so far as the obligations of the United States is concerned, as an imperfect or inchoate grant, which the Government can either repudiate or respect and consider. What is its obligation in such case? Certainly, it should be, to look into the good faith of the grantee and owners, and its obligation to respect private property. Where will that lead, according to the spirit of our institutions? If this grant should be rejected, this property goes to the use of the Government, and the property rights of the grantees and their representatives and assigns therein, will be taken and assumed by this Government without compensation, because it has the power to do so. This will be in violation of the provision of the Constitution forbidding that private property should be taken for public use without just compensation. In considering these matters, the constitution and spirit of our Government must be taken into consideration; and what is right and just should be done in view of the rights of the individual whose property may be forfeited or confiscated by arbitrary action.

It is not admitted, however, that this condition of things exist; the claimants insist strenuously that it has been shown their grant was of record in the Archives at Paso del Norte, and was lost by vandalism perpetrated thereon by American troops under the control of this Government. They further strenuously insist, even if no such record existed which could be shown, that still the long, continued, uninterrupted and exclusive possession and occupation of the grantee, his heirs and assigns, creates such a presumption in favor of the grant that a record thereof in the proper Archives must be presumed, particularly on account of the *inaction* of the Mexican Governmemt for nearly sixty-five years and of this Government for forty-five more in reference to said land.

This Court in the Ely case, 171 U. S., 233, speak-

ing of the construction of the treaty and of the act of Congress organizing the Land Court, said:

"In other words, in harmony with the rules of international law, as well as with the terms of the treaties of cession, the change of sovereignty should work no change in respect to rights and titles; that which was good before should be good afterwards; that which the law would enforce before, should be enforceable after the cession."

This language of this Court defines the duty of the Government in regard to this claim. Assuming that no grant or record of a grant has been proven for the sake of argument, still a record has been shown, which establishes the existence of a grant and perpetuates the evidence thereof, as well as a record thereof; and this has been shown from the records in the Archives in Mexico. Possession of the land has been shown since prior to 1790. It has been officially recognized as valid by the authorities of Mexico, while the country belonged to Mexico. It was enforceable under the laws of Mexico; it was property under the laws of Mexico; it came to our country as private property of the Garcias. The treaty did not declare it to be invalid, or say it should be recognized, but simply said in the absence of a location and of a record, it should not be respected and considered as obligatory. That is to say, our Government was at liberty to repudiate it, or confirm it according to right and justice and the true merits of the case. According to the declaration of the treaty, if there had been actually no record of the grant, it stood as inchoate, imperfect, subject to the will of our Government, recognized as property by international law and by the law of Mexico, belonging to individuals, and coming to our Government as such we cannot justly forfeit it. We cannot take it without adequate compensation; we cannot confiscate it, because there is no reason for so

doing. The policy adopted by our Government in dealing with land grants everywhere has been to recognize the validity of grants, although incomplete, when made in good faith, and occupied and possessed in good faith, in accordance with the spirit and intention of the law and regulations under which the same was granted and the policy of the Government making the grant.

The grant in question possesses every element of good faith, and should be confirmed.

Notice will be taken of the fact that the judge of 1st instance after the judicial proceedings had by him, carried out his decree by again measuring the lands, defining the boundaries, and redelivering the actual possession. He decided that there was title; that there was immemorial possession and long possession; he decided that the party was entitled to the property and should be protected and defended in it. Was not this act of juridical possession another step by him in the matter of the original grant, perpetuating directly the evidence of the possession as well as the evidence of the grant, and would it not stand of itself as a record of the evidence of the grant.

Would not a person, bringing suit for the possession of that property against the person entering upon that tract of land and claiming the same as public domain, be entitled to recover judgment against him under those proceedings, and under that evidence so perpetuated, even though such person claims a license from the Government of the United States?

In the Supreme Court of the United States.

THE UNITED STATES,
Appellants,

vs.

M. R. PENDELL *and* J. ESCOBAR,
Appellees.

No 211

ADDITIONAL BRIEF OF APPELLEES IN REPLY.

T. B. CATRON,
Attorney of Appellees.

In the Supreme Court of the United States.

OCTOBER TERM, ~~1901.~~ 1901

THE UNITED STATES, Appellants, vs. M. R. PENDELL and J. ESCOBAR, Appellees.	No. 211.

ADDITIONAL BRIEF OF APPELLEES IN REPLY.

Since the preparation and placing in the hands of the printer of appellees' brief, the brief and argument of appellants have been received.

It is therein contended—

First.

"There is no sufficient proof of a grant lawfully and regularly derived from the Government of Spain or Mexico."

This objection is twofold:

1st. That a Lieutenant-Governor had no authority to make a grant.

2nd. That the documentary evidence of appellees (Ex. A) containing certain proceedings had by the

2nd Judge of 1st inst., are void, and constitute no evidence of a grant, and are not of a probative character.

As to the first of these propositions, it will be admitted that Lieutenant-Governors were officers allowed by Spanish law (Law 56, Title 2, Book 3, Reynolds, 44).

They had authority to make inchoate or imperfect grants, notwithstanding any authority of the Intendentes. This was expressly held in this Court in the case of a Spanish grant made near the end of the 18th century, in the territory of Louisiana, in the case of Chateau *vs.* United States, 9 Pet., 137; also in the case following of the same title. The Court say:

> "The Lieutenant-Governor was a sub-delegate, and as such had power to make inchoate grants."

On page 125 in the same case the Court say:

> "The transfer of power to make concessions of land belonging to the royal domain of Spain from the Governor-General to the Intendentes did not affect the power of the sub-delegate who made the concession. The order in this case is the foundation of the title, and it is now capable of being perfected into a complete title. It is properly capable of being alienated, of being subjected to debts, and as such is to be held as *sacred* and *inviolable* as other property."

This decision was by Chief Justice Marshall. In the case, Attorney-General Butler made the same objection which is made here. He insisted the decrees of the Lieutenant-Governor relied on by the petitioner in that case were made in contravention of the laws, ordinances, and regulations in force at the time when they bear date. The Court in that case and the one following it, and in several others, afterwards coming before it, overruled the objections, and held that Lieutenant-Governors had the

power to make *imperfect grants* which became property, and should be held "sacred and inviolate," and approved the grant.

It was thus held that the grant was an imperfect grant, and made by the Lieutenant-Governor. That is exactly the kind of grant which the law creating the Court of Private Land Claims requires shall be presented to it and adjudicated.

If the cases of the United States *vs.* Chaves, 159 U. S. 542, and United States *vs.* Chaves, ~~159~~ 163 U. S. 523, both cited and quoted from in appellees' first brief, were not sufficient to establish a conclusive presumption of the power of the Lieutenant-Governor, to make the grant, certainly the cases of Chateau *vs.* United States, *ut supra*, ought to settle that fact.

A grant, or concession, made by an officer, who is by law authorized to make it, carries with it *prima facie* evidence that it is within his power, and the burden of proof is upon him who urges the contrary, to show the officer has transcended his power.

United States *vs.* Arredondo, 6 Pet. 691.
Delassus *vs.* United States, 9 Pet. 134.
Perchman *vs.* United States, 7 Pet. 51.
United States *vs.* Clark, 8 Pet. 436.
Strother *vs.* Lucas, 12 Pet. 436.

In Strother *vs.* Lucas, 12 Pet. 437, the Court say:

> "No principle can be better established by authorities of this Court that the acts of an officer to whom a public duty is assigned by his king, within the sphere of that duty, are *prima facie* taken to be within his power."

This case seems to have been well considered, and reviews the questions of land titles in territories acquired by treaty, such as in this case, and points out what is property of the individual and that of the Government, and the duty of the Government under the treaty, and the rights of the individual to his property. It is instructive throughout in the high-

est degree, and is full of information. The Court's attention is respectfully called to it in full.

It is true, the petition for confirmation in this grant alleges the property to have been in New Biscay. It also states exactly where it is situate; that is, in the County of Dona Ana, New Mexico, and within the limits of the Gadsden purchase. As that part of the Gadsden purchase was a portion of the State of Chihuahua at the date of purchase, petitioner fell into the error through their attorneys of supposing it had always been a part of that State; but facts brought out since filing the petition for confirmation show that portion of the country was, during the most of the eighteenth century and the early part of the nineteenth century, a part of New Mexico. And it is known no changes were made within the last forty years, prior to 1823, in that regard. This Court will take notice of the location of the political divisions of Mexico at the time of making this grant so far as they have a bearing on the grant. Appellants in their brief do not claim it to have been a part of New Biscay, but say:

> "Assuming the grant to have been made about the year 1790, the locus of the grant was either in the province of New Mexico, or New Biscay."

Actually it was, as we believe now, in New Mexico, in 1890 and for some years prior thereto, and subsequent thereto, until about the latter part of 1823 or '24.

This Court will also take notice of the public officials who existed in those times in the sections of country which were then within the territories covered by the jurisdiction conferred by the law establishing the Court of Private Land Claims. Also of the fact, that, at all times, prior to 1823, there was a Governor in New Mexico, and generally two Lieutenant-Governors; always one, at Paso del Norte, and sometimes one, at Santa Fé, where the Governor himself resided, and that these Lieutenant-Gov-

ernors had all the powers of the Governor within their respective districts when the Governor was absent therefrom.

There never was a time when an intendente undertook to grant lands in New Mexico, nor was there ever a time when the Governors therein, and the Lieutenant-Governor at Paso del Norte, did not exercise such right. Of this, the Court must take notice.

Appellees contend that Paso del Norte was not a proper place for the Archives. This is untenable. Every jurisdiction in Mexico had within its limits, at its principal town, the headquarters of its principal officer, an archive of all public documents containing the public acts and doings of the officers in such districts, especially in those cities or towns where there were Governors, Lieutenant-Governors, Intendentes and other governing officers. Paso del Norte was the capital and principal town of a district, or political subdivision. It was the place for keeping the Archives of all public acts in that district, or political subdivision. This cannot safely be questioned. If the Lieutenant-Governor of that place or district, made the grant and had the right to do so, all his acts in so doing, including a deposit of the expediente in the Archives at that place, will be presumed to be legal and regular. The burden of proof to the contrary is on appellees.

It does not appear exactly when the grant was made; it is alleged prior to 1790. If so, it may have been prior to December 4, 1786, the date of the ordinance of Intendentes, and thereby all questions raised in respect to the same being required to be made by Intendentes may have been avoided; it may have been as late as 1805, when authority was given to the Governors of the internal provinces to make grants of three and four leagues of land to the wealthy, and two to the poor (Reynolds, 73 and 74). There is no evidence whatever when the decree of December 4, 1786, was promulgated in Paso del Norte or at Santa Fé. If

it was not promulgated until after the grant was made, it would not affect the grant, although the decree itself may have been signed by the King at that time. Much delay frequently occurred in making promulgations of decrees of the King. They had to cross the ocean, and go to the viceroys at Mexico, and from thence be sent out to other subordinate officers and from them still farther on. There were always delays of many months, and frequently of many years, and sometimes a decree was never promulgated in a department or district. There is not, and never was, any evidence that the ordinance of Intendentes of December 4, 1786, ever was promulgated at Paso del Norte, or at Santa Fé in New Mexico, nor as to when it was promulgated anywhere in New Biscay. It must be noticed that public matters were not handled as expeditiously in those times as they are to-day; they were not supplied with the present modern conveniences, nor facilities of quick transportation and mails. All writing had to be done by hand, communication between Spain and Mexico was very rare, and months were required to make the trip across the ocean to the City of Mexico. Delays there occurred, and then, the distance from Mexico, overland to El Paso, through a country infested by hostile Indians, which was over twelve hundred and fifty miles; to Santa Fé over sixteen hundred miles, all of which was overland and by horseback, or on foot, or by slow carriage, which made the trip only occasionally. Under the most favorable circumstances, it was impossible for a document to be delivered and promulgated in those remote districts when coming from Spain under two or three years, and generally not much under four or five years, and frequently it never was done.

Certainly, in this case, the grant claimed to have been made "could have had a legal commencement." In such case, the Court, in The United States *vs.* Chaves, 159 U. S. 542, say:

> "If the adverse claim could have had a legal commencement, juries are advised, or instructed

to presume such commencement, after many years of uninterrupted possession and enjoyment."

Also see, United States *vs.* Chaves, 175 U. S. 523.

In the last case, the Court say:

"Possession of the land began in wrong or it began in right. If in wrong, it must be shown."

Shown by whom? Upon whom is the burden to show the wrong commencement? Not upon the claimant, surely.

The next proposition of appellees in support of their first point is that the proceedings (Appellant's Ex. A) are void and have no probative force because, as they claim, they are *ex parte*, and no notice was given to any one as an adverse party.

In support thereof, they cite two undetermined cases in this Court from Arizona, to wit:

Aribica Land and Cattle Company *vs.* U. S., No. 153, and The San Francisco Grant No. 60, printed in the transcript in the Ely case. Neither of these has been seen by appellees, but both are alleged to contain some proceedings had in Sonora in land cases. It is believed they are not in point to support appellants' contention. It is insisted by appellees that, whatever might have been the mode of procedure practiced in Sonora, it was not controlling beyond Sonora's limits or at Paso del Norte, and that a different procedure might have been had in such cases at Paso del Norte which could be urged with equal force to show that the Sonora proceedings were irregular. Surely the Sonora proceedings did not establish for Paso del Norte, what was the law for correct procedure. As a matter of practice, it could have no greater force than the practice or procedure adopted at Paso del Norte.

Appellees in their argument have referred to Sec. 93 of the Mexican decree of May 23, 1837, and given

a pretended translation which is not exactly correct. A correct translation, as we interpret it, is as follows:

> "The judges of first instance in their respective territories shall take cognizance with the Alcaldes, the one first taking cognizance retaining it to the exclusion of the other, of the preparation of inventories, judicial proceedings *ad perpetuam*, (judicial proceedings to perpetuate evidence of facts) and other legal proceedings of similar nature in which at the time there may be no opposition from any one."

Appellees cite Escriche's Law Dictionary and Moreau and Carlton's Siete Partidas as to what is meant by proceedings *ad perpetuam*. Those sections cited and quoted only refer to the general rule or practice in reference to perpetuating the evidence of certain classes of witnesses, to be used in a case pending or to be commenced. They did not refer to a case such as this, where there is no case pending and never could be. Neither did Section 93 of the decree of May 23, 1837, refer to the class of cases mentioned in the two citations made by appellees. It referred to cases where there was no opposition from any party, or any one. In construing that decree it must be borne in mind that, in Mexico, the same as in the United States, the Government could not be sued or made a party to a suit.

That section, 93, is a provision in addition to the general rule of procedure in regard to perpetuating the evidence of particular classes of witnesses in cases pending or to be commenced. It provides that judges of first instance shall take cognizance of proceedings *ad perpetuam* when there may be no opposition from any party, or any one. This does not mean party litigant, but it means when there is no opposing litigant, and was intended to reach just such a case as this, where the Government could not be made a party, and it did not appear any one claimed an interest, or that the Government itself had an interest. We insist that, in this case, it does not appear the Government had any interest;

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commenced and prosecuted, necessarily, before the corresponding judge of first instance, excepting cases in which ecclesiastics and military persons may be privileged otherwise; in conformity with the constitutional and other laws in force."

It is an established rule that, in courts of general jurisdiction, everything is presumed in favor of the regularity and legality of their procedure, even to the assumption of the issuance and service of process of summons. This Court has frequently so held, and it is therefore unnecessary to cite authority. It will be presumed that all necessary and requisite notices and citations were given and had in those proceedings before the 2d judge of the 1st instance, if any were required.

It has been frequently decided by this Court that

> "Every act of a court of competent jurisdiction shall be presumed to have been rightly done until the contrary appears."
>
> Voorhees *vs.* Bank, 10 Pet. 449.
> Williams *vs.* U. S., 1 How. 290.
> Nations *vs.* Johnston, 24 How. 165.
> Harvey *vs.* Tyle, 2 Wall. 328.
> B. & P. R. Arco *vs.* 6th Pres. Church, 94 U. S. 127.

Much more will it be held that the act of a court of a foreign country of competent jurisdiction shall be presumed to have been rightly done, for the reason that, in every foreign country, their system of procedure and administration of justice is peculiar to itself, and in such country the decree of a court which remains unreversed, must be presumed to have been justified by law, and that the Court, being learned therein, must have understood the law, and correctly interpreted it, not only as to the rights of the individuals, but also as to the procedure to reach the determination. They cannot be attacked collaterally, unless absolutely void. The decree in this case, to say the least for it, was not void, as appears

by the decision of this Court in Whitney *vs.* United States, 167 U. S., 529-543 and 544, which was cited by appellees, as sustaining their contention that said proceedings were void. They say they were similar in that case to the proceedings in this. We think they were very different. There a lieutenant of cavalry, Gallego, had entered upon the land claimed, asserting authority from the Governor, and claiming the property as public domain. A petition was made by the owner to the Alcalde, complaining of the acts of Gallego, who was not made a party. The petition, unverified, and without any evidence, alone was referred to the Governor. No proofs were taken. The Governor sustained the petitioner. He was the superior commander of the lieutenant, and the proceedings were of a most arbitrary and military character, and not in any way judicial or civil. No one was heard except the petitioner, and he not even under oath. The Alcalde, on the return to him of the Governor's decision, in an order reciting the same and the proceedings, stated that the same should remain as conclusive evidence of the rightful title of the heirs to the land granted, and its righful acquisition by them and their descendants from the King. And that the same should remain before any tribunal as evidence for all time of the title of the heirs to the tract of land. In construing those proceedings, this Court *did not say* the proceedings or actions in that matter *were void or of no probative effect*, but said, the exact contrary, that:

> "The proceedings in this litigation undoubtedly form a *strong item of testimony in favor of claimant's theory* of the case, and we are by *no means disposed to deny their weight.* * * * At the same time, they are by no means conclusive. The Crown was not a party or represented in the litigation."

The complaint was directly against the acts of a Government officer, who pretended to be acting by authority of the Governor, the representative of the

Crown. Yet this officer does not appear to have been cited or made a party. It was the act of an Alcalde, and a Military Governor based on an *ex parte* complaint of the claimants. Yet this Court, while saying the proceedings were "not conclusive," accept them as "a strong item of testimony in favor of claimant's theory of the case," and say they are "by no means disposed to deny their weight."

That certainly was a case of less formality than ours, based on less information, without any examination or procedure on an unverified petition. Yet, it had "great weight," but was not conclusive. That is as far as this Court went in declaring those proceedings void, or without probative effect.

If those proceedings formed "a strong item of testimony" and were accepted, why not the proceedings in this case, at least to the same extent? The proceedings here were judicial, and were by a court of competent jurisdiction. They were intended to supply the loss of title papers destroyed by the soldiers of this Government while in hostile occupation of the town of Paso del Norte, its Archives, and the property of Garcia. Certainly they were competent evidence under that decision, and entitled to weight as a "strong item of testimony" in favor of claimants. And should be considered in connection with all the facts therein stated, as well as those elsewhere appearing in the case.

It is claimed the Judge had no jurisdiction to make the decree. That application should have been made to the Governor to revalidate the grant. If the grant had actually been made, the loss of all papers and all records did not render it invalid; it was still a grant, and needed no revalidation. No application to the Governor was necessary. Besides the land then was within the State of Chihuahua, and the Governor of that State at that time had no such power. Juridical possession was always given by a judicial officer, generally, but not always, designated by the officer making the grant at the

time of making it, being the judicial officer in that vicinity; but on the loss of title papers and record of the grant or destruction of boundary monuments, so its lines could not be identified, such juridical possession could be reformed or again given by the judicial officer of the vicinity, and the monuments re-established, and the lines remarked at the same place. Even if the Governor in making a grant, which was sometimes the case, did not direct a judicial officer, of the jurisdiction, to give the possession, then the party, as was sometimes done, might apply to the judicial officer, himself, and have the possession given judicially, which was always considered as valid; as if the Governor had directed it. No law required the Governor to direct any particular officer, or any officer, to give the possession and mark the boundaries. That pertained directly to the judicial officer of that jurisdiction as part of his duty without direction, and it was always held that he could remark the boundaries and re-establish the monuments. To do so, he must necessarily take proofs, both as to the existence of the title, the grant or otherwise, and also as to the location of the boundary calls and monuments, so that he could establish them. Of this he was required to make a specific return to the Archives, the same as if he had done it by direction of the Governor, immediately after the grant was given; and it had the same probative effect, subject only to being questioned and overturned by affirmative action on proof that he had not established the correct boundaries or found a valid grant or title. But the question of objection to his actions were matters to be alleged and proven against them, and, until so done, his acts remained as *prima facie* evidence of everything determined by him, as stated in the case of Whitney *vs.* United States, *ut supra*.

The second proposition urged by appellees is:

> "The possession shown by plaintiff does not justify the presumption of a grant from competent authority."

Appellees make a review of the evidence in a perfunctory way, and in a manner, we believe, exceedingly unfair. The testimony is all before the Court and should be fully read and considered.

It is not insisted that the statutes of limitation will run against the Government of Spain or Mexico, except possibly in the case of "immemorial possession," which might prescribe the King and republic under Law 4, Title 8, Book 11, Reynolds 48, Appellants insist, however, that continuous adverse. exclusive possession for twenty years or more creates the presumption of a grant and the record thereof, especially in a case like this, where there is *prima facie* evidence to aid it, of the existence of a grant, and when the public authorities have recognized it more than once, and in more than one way. This by the proceedings before the Judge of 1st instance, in January, 1853, and prior thereto, in the Refugio grant, when it is referred to as the property of José Maria Garcia. The evidence taken in the proceedings before the Judge of 1st instance, consisted of six witnesses, all of whom speak of the Santa Teresa ranch having been the property of Francesco Garcia and his children, for many years, some knowing it as such since 1813. During this time the Garcias occupied it themselves with their servants and live stock, and had houses, corrals and other improvements thereon; the last three witnesses, Alejo Matinez, José Abalos and Julian Alday, all having been such servants and worked on the ranch, speak of the herds and flocks kept there, but also say they knew well the several adobe buildings of the "*principal house*" of the Santa Teresa ranch, corrals, and some shanties in which the servants lived, thus showing that, not only did the servants live there, but that there was a "principal house" evidently for the occupation of the Garcias and their families.

The first witness, Francisco Rascon, says he sometimes saw Francisco Garcia there, with his servants and herds. There is no pretence that, during the time testified to by these witnesses, any one ever

disputed the right of Francisco Garcia and his heirs to that property, or ever interfered with their right or occupation, except as claimed by the appellees during the last three years thereof, prior to January, 1853, when they claim from the evidence of one of the witnesses examined by the Land Court that he claimed some land there on the South side, but it is shown that that was south of the Piedras Paradas, and he and his father did not herd north of the Piedras Paradas.

The evidence of these eight witnesses was enough to establish the presumption of a grant and record thereof, without reference to other evidence, but taken in connection with all their evidence, it is conclusive. There was a claim by the Garcias, and admissions by the authorities that Garcias held the land by grant, every one acknowledged and respected them as the owners of the land by grant. The authorities investigated and decided they were the owners by title, by long possession, and by "immemorial possession," and again delivered the possession and re-marked the boundaries. No one, even under the evidence on cross-examination of the witnesses examined, by the Land Court, ever claimed any adverse right in said land against the Garcias, not even the witness who claimed that he and his father had a concession for a piece of the land, first stating it was from the Garcias and then from the Government of Mexico, finally stating it was to the south of the Piedras Paradas, but he did not know where it was.

We also have the evidence taken before the Surveyor General, of witnesses Nañes and Castañeda, pages 113 and 114. The first testified he knew the grant of Santa Teresa from 1840, during all which time it had been occupied by the heirs and children of Francisco Garcia and José Maria Garcia by living on it, by pasturing all kinds of animals on it, and by cultivating portions of it; that they had on it houses, corrals, and other improvements, which they and their servants occupied "*all the time*"

since 1840, up to a year or two before he testified in 1877. That, ever since he could remember he knew the property, was recognized and respected as the property of the Garcia heirs, who had all that time *held, possessed, cultivated, pastured, managed and controlled it as belonging to them by inheritance.* Castañeda testified June, 1877, he was then forty-eight years old; that he knew the property and had known it ever since he had use of reason; that he had always understood that the Santa Teresa ranch had always been considered and respected by every one as the property of Francisco Garcia and his heirs, under a grant from the Spanish Government; that he knew ever since he *had any knowledge*, that the heirs of said Garcia *had occupied and held said ranch as their property under claim of title by virtue of a grant from Spanish authorities* in Mexico up to a few years previous to the time he gave his evidence, when they sold to Escobar, who had since then occupied it; that during his recollection there had never been any interruptions in the possession of said ranch by said heirs up to the time they sold to Escobar. These two witnesses make a clear and clean case of occupation and possession of the property by residence, improvements, cultivation and pasturage for sixteen or eighteen years prior to July 4, 1854, the date of proclaiming the Gadsden treaty. Surely the proceedings before the 2d judge of the 1st instance in January, 1853, carries that possession and occupation back to the beginning of the 19th century, nearly, and makes a continuous exclusive, adverse possession for a period of half a century prior to the treaty.

The next line of evidence was that of the witnesses examined before the Land Court or some member of it. Only one of those witnesses goes back of 1850. Pedro Melenudo to 1842. He corroborates Nañes and Castañado. There were eight of those witnesses. They all testify they knew that the property in question was always *recognized* and

respected as the property of the Garcias; that José Maria Garcia, wife and children, lived there, cultivated the land, pastured animals on it, had servants and houses and other improvements there. Some of them say he gave permission for people to cut wood and pasture, sometimes, and prohibited others from doing so. Others of the witnesses, on cross-examination, say that people pastured and cut wood generally on both sides of the river. None of them state specifically that they cut wood or pastured within the grant, but they do say they cut and pastured below the grant, above it, and on the opposite side of the river, and then say on both sides of the river, without designating the locality. None of them, however, pretend that they knew such acts were done *in hostility* to the Garcias, but most of them show it was by his consent or permission; and generally the pasturing was by persons having animals from him on shares. None of them say such persons claimed any right hostile to the Garcias, or otherwise than under the Garcias, except the witness Velarde, who says he had an interest in the grant which Garcia gave him; but afterwards states the Government gave it to his father, but says it was south of the Piedras Parades; that he pastured his cattle on it, but only went up to the Santa Teresa, and that he was afterwards driven out by Escobar; that he had no documentary title. After saying that Garcia gave the interest, he says the Government of Mexico gave him the land when he was fifteen or sixteen years old; that he was then sixty-five years old. He could not have been twenty-one years old at the date of the Gadsen purchase. At folio 94, page 66, he says: His father claimed the land at Piedras Paradas *and no other place;* he afterwards states that he did not pasture above Piedras Paradas and could not say where the land was; that there were no documents for the same. There is no showing or any claim by any one *within* the grant, or of *any pasturage*, or *cutting of timber in the grant antagonistic to Garcia.*

When the testimony of the eight witnesses is considered, it will be seen there is nothing in it in conflict with the idea that all the pasturing within the grant, and cutting of wood within the grant, if any was cut, may have been in harmony with José Maria Garcia's claims. Some of the witnesses show that pasturing was done by his permission and by persons having the animals on shares from him; others that he gave permission to some to cut timber and refused it to others. Certainly all that is specifically pointed out as to pasturage, was either off the grant or by Garcia's consent. This tract of land was ten miles in length along the river-front. It was permissible at all times under the laws and customs of Spain and Mexico for owners of animals to have access to water, in arid regions, over the lands of others. Some of the witnesses show the animals were pastured out on the plains, and driven into the river for water. This is not inconsistent with the rights of Garcia, even if they went over his land, as they had a right of way to the water.

A fair consideration of the evidence of said eight witnesses will show that Garcia was recognized, acknowledged and respected by every one as the owner of the property in question, even by those who may at times have had animals on it, or may have cut wood thereon. He resided and had servants there, had personal possession, and constant use of the property, and put his animals on shares with other parties who, it seems, he permitted to pasture there.

It is insisted that the Guadalupe Miranda Grant (invalid) pretended to have been made in July, 1851, conflicted with this property. Miranda was one of the witnesses in 1853 before the judge of 1st instance: he was at one time prior thereto Secretary of New Mexico; at another, he was commissioner of Mexico and Chihuahua to grant lands to colonists from New Mexico. This pretended grant to him was nearly all, if not all, to the south of the land in

question. It was at Muleros Hill, which was south, as shown, of the property in question. Some say, a league or more. That grant was held to be invalid, and there is no proof he ever possessed it, or claimed or did anything with it in hostility to the grant in question. If he had claimed it conflicted, he would have said so in his evidence before the judge of 1st instance. A proper construction of the evidence of said eight witnesses will add great strength to the possession of the Garcias previously shown, commencing as far back as 1813, and show a constant claim of right and title recognized and respected by every one, consistent with the said proceedings, and juridical possession had by the judge of 1st instance.

While appellants do not believe it necessary to claim a title by prescription, since long, continuous, uninterrupted possession will invoke a presumption of a grant, and of its record; yet, if necessary, does not Law 4, Title 8, Book 11, favor such title by "immemorial possession" of a place. The last part of that law says:

> "By that which the laws say that *the things* of the kingdom cannot be gained by time, the taxes and tributes due us should be understood."

Is this not a declaration that it shall be understood that only taxes and tributes are not to be gained, but that everything else may? The authority cited from Whitney's case, 171 U. S., by appellants intimates that bare pasturage only which may have been interrupted, was not sufficient to fix the extent or boundaries of a grant of itself. That case did not hold that pasturage, was no evidence of possession, or that it, when connected with actual occupation and residence of the party or his servants, and when coupled with actually designated boundaries and recognized by the public authorities and claimed up to those boundaries, was not evidence of possession which would aid in invoking the presumption of the grant.

The judge of 1st instance fixed a cottonwood tree, standing near the bank at Cobreña Bend, with three or four palmetto plants as the north boundary or boundary furthest up the river of the property in question.

One witness says, that tree was called alamo-naranjo, but stated it was *only one* league from Piedras Paradas, and that there was another tree called alamo de lemon, two or three leagues further up the river. The grant was four leagues long up the river from the Piedras Paradas Bend, and would extend to the last-named tree at least. There is no evidence identifying the tree which was marked as the north boundary. The Court did not seem to think so, as it did not designate any tree as the north boundary, but only the Cobreña Bend. That tree possibly was carried away by the river in its changes. The Cobreña Bend cannot be mistaken. Appellees claim the "Isla" was not in this property, but Plaintiff's Exhibit 16, between pages 120 and 121, which has been identified as a correct plat of the land, shows it to be south of the Cobreña Bend (Rincon), and this is not contradicted. The witnesses say, it is within the property in question.

The third proposition of appellees is:

> "There is no proof that this grant was duly recorded in the Archives of Mexico as required by Art. 6 of the Gadsden treaty."

This proposition has been argued in appellees' first brief sufficiently. Appellants cite various authorities to the effect that there should be a memorandum of the grant entered in a book (toma de Razon). That only applies to grants made in territories under and after the regulations of November 21, 1828, according to Section 9 thereof, which can in no manner apply to this grant.

T. B. CATRON,
Attorney for Appellees.

SUPREME

Filed ... 1901

UNITED STATES.

OCTOBER TERM 1901.

THE UNITED STATES, Appellant, vs. M. R. PATRICK, and JESUS ESCOBAR, Appellees.	Appeal from the Court of Private Land Claims, Territory of New Mexico.

SECOND REPLY BRIEF OF APPELLEES.

T. B. CATRON,

Attorney For Appellees.

THE OPTIC PRINT, E. LAS VEGAS

IN THE

SUPREME COURT

OF THE

UNITED STATES,

OCTOBER TERM 1901.

THE UNITED STATES, Appellant. vs. M. R. PENDELL and JESUS ESCOBAR, Appellees.	Appeal from the Court of Private Land Claims. Santa Teresa Grant In New Mexico.

SECOND REPLY BRIEF OF APPELLEES.

T. B. CATRON,

Attorney For Appellees.

SECOND REPLY BRIEF OF APPELLEES.

Appellants in their brief in reply undertake to answer the briefs of appellees in some regards. We will not, however, undertake to reply to all they have said in their reply, as we deem our former briefs sufficient.

As far as can be learned by examination of all the laws and decrees which can be found, as well as the histories of Mexico and New Mexico, the district of Paso del Norte from the early part of the eighteenth century to the time of the Mexican independence was generally recognized to be the province of New Mexico, although there seems to have been at times a doubt whether it was in Chihuahua or New Mexico. By the act of the Mexican congress of July 6, 1824, Chihuahua was made a state of the Mexican federation, and New Mexico a Territory in the same.

Dub. y Loz. Leg. Mex. 709-10.

By an act of the same congress of July 27th, found in the same compilation, p. 210 No. 413, the boundaries of Chihuahua were fixed so as to include the town of El Paso within it; the northern boundary of the state running from the town from east to west

It is claimed by appellants in the 4th subdivision of the reply brief, that the case of U. S. vs. Chouteau, 9th Peters 137, and U. S. vs. Chouteau, 9th Peters, 147, and Delassus vs. U. S., 9th Peters, 116, are not in point as to a lieutenant-governor having the power to make a grant, because they say in New Mexico or Mexico he was not a sub-delegate, and that in these cases he was directed by the governor to make the grant. We do not so understand those cases. If he had no such power by virtue of his office, the governor could not confer it. The supreme court in those cases expressly state that the lieutenant-governor was a sub-delegate, and that he had the right to make an imperfect grant independent of any authority from the governor, but that to be perfect, the grant should be confirmed by the governor intendant, but they did not hold that the authority of the governor was necessary in order to make an imperfect grant, but on the contrary, they held that he had such authority, and afterwards in the case of Menards' Heirs vs. Masey, 8th How. 301, they again re-affirm this doctrine. By the general law of Spain, governors were authorized to appoint lieutenant-governor in their jurisdiction within the different districts. What was a sub-delegate? The governor of a province, or the intendante of a province, both of whom were appointees of the king, were recognized as the delegates of the king. They were authorized to appoint subordinates in the different districts of their jurisdiction, having therein the powers they possessed, and by virtue of such second appointment or delegation, they were known or

recognized as lieutenant-governors or sub-delegates. Sometimes they were called Lieutenant-governors, sometimes they were called sub-delegates.

The law in Louisiana at the time of the grants referred to in the said two cases of Chouteau's Heirs and the cases of Clarke and Delassus, all found in 8th and 9th Peters, was exactly the same as that in the republic of Mexico. By a reference to White's Rec. Vol. 2, p. 469, it will be seen that as early as Aug. 29th 1797, the entire ordinances de intendantes, establishing and furnishing instructions for the intendantes of New Spain, which contained 306 articles, was at that time in force, in Louisiana, in all of its parts; in a communication of that date, Morales, the acting intendante, furnished a copy of those instructions to the governor, and gave a copy therein of article 81, which is there better translated than in Reynolds, at page 60. In that article express authority is recognized in the sub-delegates to make confirmations of grants which may be applied for in accordance with the royal instructions of Oct. 15, 1854, and it was under this authority that those sub-delegates were authorized to make imperfect grants. By article 10 of said regulations of intendant, Reynolds, 60, it is provided that the political and military government of New Mexico shall remain in existence, and consequently they are to continue with the causes of justice and police, united under the military commands in their respective territories or districts, with the exception of what corresponds to "propios y arbitros" which last words are translated in Reynolds "municipal domains", but which mean lands

and estates belonging to a city or civic corporation to support of their expenses, and the right to tax certain things in a civic corporation or city to raise revenue; otherwise it means the ways and means given a city, town or village to raise means for their expenses, and does not refer in any manner to public domain. Said Sec. 10, as translated by Reynolds, says: "and with the view of securing in all that kingdom the success of the important object referred to in the foregoing articles (Art. 9) by reason of the sub-delegations it provides for, I command that the several intendants likewise make them in the said governors."

It will be noticed that the governors of the various provinces were not in any manner abolished, but on the contrary, the intendant were required to make them sub-delegates, and this is all of the authority which existed in Louisiana on the same subject, as the same law prevailed there, at the time of making the grants adjudicated in those cases cited. The word governors may have referred to lieutenant-governors as well as to the principal governor. Sec. 10 recognizes sub-delegates of the intendant and their requirements that the governors shall also be made sub-delegates by the intendants. This evidently must have referred to and included lieutenant-governors, otherwise there was no law in the case of Chouteau vs. U. S. 9th Peters (two cases,) and in the cases of Clarke vs. U. S. 8th Peters, and Delassus vs. U. S., 9th Peters and Menards' Heirs vs. Massey, 8th How., all before cited, which would have justified the statement that the lieutenant governor was a sub-delegate. At least we can

find none. The laws were the same; the officers must have been the same. The officers with the same designation and under the same law exactly, performed the same duties and did the same acts, both in upper Louisiana and in New Mexico or Chihuahua, except that in New Mexico there never was an intendant who undertook to exercise any authority. Evidently the regulations in respect to intendants was never promulgated in New Mexico; besides New Mexico never was included in any one of the twelve intendencias, but by Article 16, it was provided that New Mexico should continue with its existing government, both *political* and *military*, except what pertained to the property of cities, towns and villages, and their right to tax for purposes of paying their expenses, and what belonged to the community property of pueblos. These embraced in the exception were exclusively under the jurisdiction of intendants subordinate to the supreme treasurer; which implies everything not embraced in the exception remained vested in the governors.

Appellants in their brief say that the burden of proof is on the appellees to show that the lieutenant-governor was a sub-delegate, We think that is shown already by the fact that the law in Louisiana and Mexico are exactly the same, and that the officers performed their duties in exactly the same way. Under the decision in the Louisiana case (or Missouri cases) of Chouteau vs. U. S., the supreme court did not give any weight whatever to the direction of the governor, but stated emphatically that the lieutenant-

governor was a sub-delegate, and had a right to make imperfect grants. He was a sub-delegate because he was the subordinate, or the governor-intendant, who was the delegate of the King, and for no other reason. Appellants in their argument have insisted that there was a practice in Sonora different from that in Paso del Norte, which may be true, but it does not change the facts.

The attention of the court is called by appellees to another case of a grant made by the lieutenant-governor at Paso del Norte for land a few leagues above that town on the opposite side of the river from the property in question. The grant was made to Juan Antonio Garcia; that grant, like the one in question, was destroyed by the American troops when they occupied Paso del Norte in 1846, and proceedings, similar to those in this case. were had before the same judge as in this case. Those proceedings being had partly in the year 1849, and it was decided by the surveyor general in considering the transcript of those proceedings that the grant was made to Juan Antonio Garcia in the year 1822 or 1823 by Jose Ordas, the lieutenant-governor at El Paso; that owing to the destruction of the public archives, where such documents were ordered to be kept, at that place in the year 1846 by the American troops, it was impossible for the grant itself or a copy thereof to be presented by the claimants. This grant was the claim of Hugh Stevenson vs. U. S., private land claim No. 32, corrected No. 6, and was confirmed by the act of congress of June 21, 1860 as claim No. 6. The fol-

lowing is a copy of the decision given by the surveyor general in that case which substantially states all of the facts; showing the case to be identical with the one in question in every respect.

SURVEYOR GENERAL'S OPINION.

contained in House of Representatives, report No. 457, 35th congress, 1st, session May 29th, 1858.

Hugh Stevenson et al, vs. the United States. Grant.

"The above case was set for trial on the 1st day of December, 1856.

"In the year 1805, Juan Antonio Garcia petitioned Joaquin Real de Alencaster, the governor of the province of New Mexico, for a grant of land in what is now the county of Dona Ana, to extend from the Bracito, on the Rio Grande, to the marsh or lake of Trujillo, promising to build a house, erect enclosures, and cultivate the soil; maintaining fifteen men there at his own expense, for the purpose of protection, until travel and the benefits to be derived from working the mines in the adjoining mountains should attract a sufficient number of persons to form a permanent settlement.

"On the 4th day of August, 1805, Juanquin Real de Alencaster the governor of the province to whom the petition was addressed, decreed that the grant would be made whenever settlement should be established in the vicinity of the land petitioned for. On the 29th of November, 1816, Juan Antonio Garcia again petitioned Bernardo Bonavia the commandant general of the state of Durango, for a grant of the land of which he had been in possession since the year 1805, and containing the same boundaries set

forth in the petition made by him in that year, stating that there were several individuals of El Paso who had volunteered to accompany him in the formation of a settlement, and also promising to plant certain lands for the Apache Indians, and furnish them with provisions from the crops he might raise at the above mentioned place, for the purpose of keeping them at peace.

"On the 14th of April, 1817, the commandant general referred this petition to the lieutenant-governor of El Paso, requiring him to report thereon. On the 29th of June, 1819, Jose Ordas, the lieutenant-governor of El Paso, reported in favor of the petition.

"On the 17th of July, 1817, the commandant general of Durango returned the petition to the lieutenant-governor of El Paso, requiring him to enclose the list of persons who were desirous of accompanying Juan Antonio Garcia in the formation of the settlement referred to in his petition, and to state the extent of the land petitioned for, its distance from the nearest settlement, its resources, &c., and if the settlement and residence of the judicial and ecclesiastical officers could be formed in the centre of the land petitioned for. On the 30th of August the lieutenant-governor of El Paso reported that the land contained in length about three leagues, and in width from one-fourth to over one league; that there was an abundance of water and pastures, and offered every facility for cultivation; that there was difficulty in establishing the settlement and residence of the officers in the centre of the land asked for, and that it was about fifteen leagues distant from the last houses of the town of El Paso, and enclosing the list of those persons who had volunteered to accompany Garcia in the formation of the settlement.

"On the 12th of September, 1817, Juan A. Garcia addressed a petition to the lieutenant-governor of El Paso stating that, as the circumstances which existed at the time he applied for a grant to the land in question had changed, he prayed that no further action should be taken in the premises until requested by him.

"On the 18th of February, 1820, the said Garcia again petitioned the governor of New Mexico, stating that those who had volunteered to accompany him in the formation of the settlement had given up the idea of going, on account of the many restrictions placed upon the grant, and that, as he had been occupying the land for eleven years, he hoped that this circumstance would be no reason why the grant should not be made to him alone, and still promising to maintain a small number of armed men at his own expense, and build houses, erect enclosures, and cultivate the land which was not occupied by the Indians, concluding his petition by praying that the grant be made to him, if convenient to the service of the king.

"On the 18th of Aug. 1820, Facundo Melgares the governor of New Mexico, declined making the grant on a supposed want of authority in the premises, and referred the petitioner to the proper authorities in the case.

"On the 28th of July, 1821, the said Garcia again petitioned the commandant general of Durango for a grant of the Bracito tract, recapitulating all the steps he had taken in the premises, and the action of authorities from 1805 up to that date.

"Immediately following this petition is to be found a statement, made by the comptroller of the state of Durango, recommending that the grant be made, and that the testimony of witnesses be taken in order to ascertain whether the land petitioned for

was severed or not from the public domain, and in case it was not, that an attorney general be appointed to superintend the interest of the public revenues; and that a report be subsequently made, in order to ascertain the resources of the land, and its adaptation to the raising of stock and cultivation.

"On the 17th of January, 1822, the above proceedings were transmitted to the first justice of the town of El Paso with instructions to comply with the request contained in the statements of the comptroller.

"On the 18th of April, 1822, the justice of El Paso proceeded to take the testimony of witnesses as to whether the land was public domain or not, and it was proved by said testimony that the land in question had not been severed from the public domain but was public land. The above proceedings were then transmitted by George Juerena, the justice aforesaid, to Don Jose Maria Cordova of the vicinity of El Paso, who on the 19th of April of the same year, reported the extent, locality, resources, &c., of the land petitioned for. In order to comply with all the requirements contained in the statement of the comptroller, George Juerena, the justice aforesaid, appointed Julian Bernal as attorney to superintend the interests of the public revenue, and transmitting all the proceedings to him required him to report on such matters as appertained to his duties, as such attorney. The report of the attorney aforesaid does not appear in full in the documents field in this office, having been torn off at some period unknown to the claimants.

"A certificate, given by the second justice of the cantonment of Bravos follows the above, certifying that they are true copies of all the papers which could be found in the archives of El Paso relative to the Bracito grant of land, and which remained after

the destruction of the archives by the United States troops, in the year 1846.

"On the 30th day of March, 1829, Francsco Garcia y San Juan, son of Juan Antonio Garcia, who departed this life in the year 1828, addressed a petition to the prefect or justice of the opposite side of the River Bravo requesting him, after reviewing the testimony presented to him, showing the occupancy of his father from the commencement of the present century up to the time of his death, in the year 1828, and that a grant was made to him according to law, that he declare him a legitimate owner of the Bracito tract of land. On the 13th of February, 1849, Francisco Garcia y San Juan petitioned the justice of El Paso to cause certain individuals, therein named, to appear before him to answer the interrogatories contained in the petition as to whether the witnesses were acquainted with his deceased father, and if he resided at the Bracito from the commencement of the present century up to the time of his death; if they knew that at his own expense he cultivated the lands of El Bracito during his lifetime, and if he was lawfully placed in possession of the land by the competent authorities of the country; and that if he (the son) abandoned the land on account of indolence, or on account of the invasion of the Indians.

"The answer to these interrogatories shows that Juan Antonio Garcia occupied the Bracito lands during the time mentioned; that he had cultivated the same at his own expense; that he was lawfully placed in possession by the competent authorities of the land; that some of the witnesses had the original documents granting the possession in their own hands; and that Francisco Garcia y San Juan abandoned the land on

account of the constant attacks of the Indians and the hourly exposure of his life.

"On the 17th of March, 1849, Juan Maria Ponce de Leon, political chief of the cantonment Bravos, at the request of Francisco Garcia y San Juan, certified that Juan Antonio Garcia deceased, petitioned for a grant of land at the Bracito; that he resided there for many years, cultivating the soil and raising stock; that almost at his own expense, he kept the neighboring Indians at peace, and rendered many important services to travelers,and even to the entire nation, until the hostilities and incursions of the Indians drove him away; that at a subsequent period, a grant of land was made to one John Gill in the vicinity of El Bracito, and that the limits of the Garcia's lands were always excepted from being granted to others, and that he knew all of those facts, having been appointed a commissioner by the Mexican government to examine the land petitioned for.

"Further interrogatories were taken in the year 1849 showing that a grant was actually made to Juan Antonio Garcia by Jose Ordas who was at the time lieutenant governor of El Paso, and testifying to the boundaries of the grant.

"It is also proven, that at the request of Francisco Garcia y San Juan, the United States troops, during the war with Mexico in the year 1846 when they took possession of the town destroyed a large portion of the public archives of El Paso, where the originals of all grants were required to be deposited, thereby preventing the claimants from procuring all of the documents necessary to the establishment of their claims * * * *

"It is not necessary for this office to examine into the validity of the testimony taken by the claimants in support of their claim, or whether it is taken in ac-

cordance with the requirements of the usage in taking testimony in a foreign country, to be used within the United States, there being no instructions to this office other than to receive the testimony presented by the claimants, and the question is, therefore, submitted for the deliberations of congress.

"From the facts set forth in the testimony presented, it appears that Juan Antonio Garcia was in possession of the Bracito tract of land in the year 1805, and that he and those purporting to be his heirs and their assigns have continued in possession of the same up to the present day.

"The testimony also shows that a grant was made to Juan Antonio Garcia in the year 1822 or 1823, by Jose Ordas the lieutenant-governor of El Paso; that owing to the destruction of the public archives, where such documents were ordered to be kept, at that place, in the year 1846 by the American troops it was impossible for the grant itself or a copy thereof to be presented by the claimants, although diligent search was made for it without success.

"The claimants have not presented any testimony to prove that the present claimants are the legal heirs and assignees of Juan Antonio Garcia, deceased. It is the opinion of this office that the case is one covered by the treaty of Guadalupe Hidalgo of 1848 and sustained by the decision of the supreme court of the United States in the premises, and that therefore the grant made to Juan Antonio Garcia by the authorities of the Mexican government, in the year 1822 or 1823, is a good and valid grant; and as no claim of title is presented to show that the present claimants are the legal heirs or assigns of said Juan Antonio Garcia, it

is the opinion of this office that the grant should be confirmed to Juan Antonio Garcia alone.

"The case is, therefore, transmitted to the proper department at Washington for the action of congress in the premises."

(Signed) WILLIAM PELHAM,
Surveyor General."

Counsel for appellants allege that appellees have shown no case of a grant by a lieutenant-governor at El Paso del Norte and say that during their investigation through the records of hundreds of grants they have not found one purporting to have been made by a lieutenant governor at El Paso del Norte or any lieutenant-governor except Juan Paiz Hurtado in 1835, who as a lieutenant governor at Santa Fe at that time, while the governor was visiting El Paso del Norte, made some grants, and which grants they allege were revoked by Governor Cruzat. Those grants were not revoked by Cruzat because of the want of authority in a lieutenant governor to make them—in fact he gave no reason for his revocation. If Hurtado had no authority, Cruzat would have declared them to be void and not revoked them. We submit that the above mentioned case of Hugh Stevenson and the surveyor general's opinion in the same above quoted show a grant made by a lieutenant-governor at El Paso del Norte which was recognized as valid and confirmed by congress as private land claim No. 6, June 21, 1860; the proceedings therein being printed in H. R. document, 35th Cong. 1st session, p. 24,

report 457, and shows that the papers in such case had been properly placed in the archives at El Paso which was the proper place of archives of "all grants" in that district.

From El Paso del Norte north up the Rio Grande there were no settlements prior to the Mexican independence until Socorro was reached, a distance of about 180 miles; all of which country between said two places was frequented at all times by hostile Indians and subject to their incursions. The case of Stevenson and also our case show that the Indians interrupted the settlements on both those grants although they were not far from Paso del Norte. It was doubtless on account of the Indians that no more grants were made north of El Paso prior to the Mexican independence. The Stevenson grant and ours being the only two of which there is any record of having been made prior to that date. What may have been made below the town of El Paso in the present state of Texas east of the river and on the west side of of the river we have no knowledge because such cases did not come before either the surveyor general of New Mexico or the court of private land claims, but we insist that the Stevenson case is directly similar to the case in question in every respect. It was made by a lieutenant governor, the grant was placed in the archives at El Paso, which that case says was the place where "all archives" of grants in that jurisdiction were kept. That case shows that the archives were destroyed by the American troops in

1846, and that they were quartered in the rooms where the archives were kept; that subsequent thereto the owners of the grant of land applied to the local judiciary at El Paso del Norte in 1849 to have their grant titles re-estabilshed or perpetuated, or new evidence of it given, and that proceedings were had similar to those in this case except with not quite as much formality; that grant, on those papers, was presented to the surveyor general under the act of 1854, and the 8th section thereof, and was by him recommended for confirmation to congress, and was by congress confirmed on exactly similar title papers to those presented in this case. Certainly that case shows that the lieutenant governors were in the habit of making grants; there possession had not been held as long as in this case. The proceedings in that case also were not as strong as in this case; they were taken in the year 1849 after the treaty of Guadalupe Hidalgo, the most of the land in that case being on the east bank of the Rio Grande, and not within the Gadsden purchase, while all the land in the Santa Teresa case was in the Gadsden purchase.

In regard to the effect of the decisions of the Spanish courts or Mexican courts, in matters of this nature, the attention of the court is called to the case of Keene vs. McDonald, 8th Peters, 310, the court say: the petition alleges that the proceedings under which the second sale was made were irregular and unlawful.

"Should it be admitted that it was competent for the plaintiff to impeach the adjudication, and show that the proceedings were irregular and unlawful, the record contains no offer at the trial to show any irregu-

larity or illegality in those proceedings; they must at least be taken as prima facie evidence of a judicial proceeding to pass the title of the land according to the course and practice of the Spanish law in that province." * * * * * * * * * *

"The adjudication having been made by a Spanish tribunal after the cession of the country to the United States, does not make it void; for we know historically that the actual possession of the territory was not until sometime after these proceedings took place. It was the judgment, therefore, of a competent Spanish tribunal having jurisdiction of the case, and rendered whilst the country, although ceded, was, defacto, in the possession of Spain, and subject to Spanish law."

We have shown by this quotation of the opinion of the surveyor general in the case of the Stevenson grant confirmed as private land claim No. 6 so corrected from its original file No. 32 by the first clause of the act of congress, June 21, 1860, as well as by the present case what was the practice and procedure in such cases at Paso del Norte, and that Paso del Norte was the place where the archives of "all grants" were kept which were made at Paso del Norte.

These two cases—that is, the one under consideration, and the Stevenson case, being exactly alike in every particular, except that congress confirmed one, certainly show the practice which existed at Paso del Norte in regard to making grants in that vicinity, and also the practice which prevailed in order to perpetuate the evidence of the existence of the grant and its extent and occupation when the papers were lost. They show that there was a lieutenant governor at that point, and

that he exercised such powers; it also shows that there was some doubt as to whether that district was in New Mexico or in Chihuahua, but there is no doubt shown as to the right of the lieutenant governor to make the grant. These are the only two grants of which there is any record as to having been made in that district of country prior to the independence of Mexico except the John Gill case (cessna) made by the town authorities of El Paso del Norte. There is one other which was made about the year 1840 to the colony of Dona Ana under the regulations established by the State of Chihuahua in which the governor of that state did not participate. That and the Gill case were under the Mexican rule. Our case and the Stevenson case were under Spanish rule.

T. B. CATRON,
Attorney for Appellees.

Supreme Court of the United States.

No. 211.—October Term, 1901.

The United States, Appellant, vs. M. R. Pendell and J. Escobar. } Appeal from the Court of Private Land Claims.

[April 21, 1902.]

Mr. Justice Peckham delivered the opinion of the Court.

The government appeals in this case from a decree of the Court of Private Land Claims in favor of the appellees, confirming their title to a certain tract of land in the county of Dona Ana, Territory of New Mexico, alleged in the petition to contain four square leagues. The petition of the appellees alleged the making of a grant to their predecessors prior to the year 1790 of a tract of land known as Santa Teresa; that the grant was a good and valid one, and the grantee entered upon and took possession of the same, and that he and his heirs and assigns continued in peaceable possession up to and after the ratification of the treaty of December 30, 1853, between the governments of Mexico and the United States, by the terms of which treaty territory, including the Santa Teresa grant, was transferred to the sovereignty of the United States. The petition then alleged that in the year 1846, while the original documents of title were in existence in the town of Paso del Norte, in the State of Chihuahua, where the heir resided, the place was occupied by the military forces of the United States, and the original documents of title and the official registry where they were recorded were destroyed by the American forces; that proceedings had been taken on January 7, 1853, for the purpose of perpetuating evidence of the title, and in accordance with which the judicial authorities re-established the boundaries and monuments of the grant, and placed the heir in formal and legal possession of the same on January 16, 1853. A certified record of these proceedings was alleged to be on file in the office of the United States surveyor general for the Territory of New Mexico, a duplicate copy of the same in the Spanish language, with a translation also in duplicate, being filed with the petition. The boundaries of the grant were stated, and the petitioners averred that they were the owners in fee of the land contained in the grant by inheritance and purchase from the original grantee, Francisco Garcia, and that the title of the original grantee, his heirs and assigns, in and to the grant was complete and perfect at the date when the United States acquired sovereignty over

the Territory of New Mexico, and also at the time of the ratification of the treaty between the United States and the Mexican Republic, known as the Gadsden purchase, on December 30, 1853; and it was averred that the land had been in the peaceable and undisturbed possession of the original grantee, his heirs, &c., from the date of the making of the grant to the present time; and that there was no person in possession of the land claiming the same adversely to the petitioners or otherwise than by lease or permission from them.

The answer of the United States denied all the material averments of the petition, and denied that the petitioners were entitled to the relief or any part thereof prayed for, and asked that the petition should be dismissed. Subsequently certain persons, claiming adversely to the petitioners, entered their appearance by their solicitor as defendants.

The principal issue in the case in regard to the boundaries of the alleged grant related to the southern line, the petitioners claiming that it was located at the international boundary line, while the government claimed it was above the Southern Pacific Railroad bridge, a considerable distance north of that line. The interests of the individual defendants, who were co-defendants with the government, were upon the tract of land lying between the international boundary and the line of the Southern Pacific Railroad bridge. The decree of the court fixed the south boundary at the point contended for by the government, thus leaving the lands in which the individual defendants were interested untouched, and as this location of the line has been acquiesced in by the petitioners, the case no longer has any bearing upon the interests of those defendants.

The decree of the court was in favor of the petitioners, establishing their grant, with the southern line thereof as stated, and found that the petitioners were the grantees or assignees of the title of the original grantee, Garcia. Two of the judges dissented from the opinion and judgment of the court upon grounds stated in their opinions. The court made the following findings of fact:

"That prior to the year 1790, in accordance with the petition of Francisco Garcia, a citizen of the province of New Mexico and Kingdom of Spain, then and there duly made and presented to the duly authorized representatives of the King of Spain in and for New Biscay, which is now the State of Chihuahua of the Mexican Republic, the said authorities and representatives of the Crown and the King of Spain, by virtue of the power and authority in them vested as such, and in accordance with the laws, usages and customs of the said Kingdom of Spain, made to the said Francisco Garcia a grant of a certain piece and parcel of land situate in the county of Dona Ana, in the Territory of New Mexico, as at present constituted, the same then being a dependency and province of the said Kingdom of Spain, said piece and parcel of land so granted as aforesaid being bounded, described, located and designated as follows:

"The tract of land known as the 'Santa Teresa:' Bounded on the north by that bend known as the 'Cobrena;' on the south by the bend of the Piedras Paradise, the same being somewhat to the north of the present location of the Southern Pacific Railroad bridge, where the same crosses the Rio Grande del Norte; on the east the old bed of the said Rio Grande del Norte, as the same ran and existed in the year 1853; and on the west the brow of the ridge running parallel with the said river.

"2. That thereupon then and there the said Francisco Garcia was duly placed in legal possession of the said grant by officials to that end duly authorized by the laws, usages and customs of the said Kingdom of Spain, according to the laws, usages and customs then in force.

"3. That the land included in the said outboundaries continued in the possession of the said grantee, his heirs, legal representatives and assigns, from the time of the making thereof, prior to the year 1790, as aforesaid, down to the present time, and that the petitioners herein have succeeded in part to the rights of the said original grantee.

"And the court thereupon finds, as matter of law, that by reason of the facts aforesaid an imperfect or equitable title and right such as the United States under the stipulations of the treaty of Guadalupe Hidalgo ought to recognize and confirm to, the said land was vested in the said original grantee aforesaid, which right and title existed at the date when the United States acquired sovereignty over the country now embraced within the Territory of New Mexico, within which the said grant is situated, and that the petitioners herein are entitled to have the same confirmed to the heirs, representatives and assigns of the said original grantee.

"It is therefore adjudged, decreed and specified that the said private land claim, the subject of this suit, is a valid claim against the United States of America for the land included within the natural boundaries above set forth, and the claim to the said land grant as designated, located, bounded and described herein be, and the same hereby is, confirmed to the heirs, legal representatives and assigns of the said original grantee, excepting, however, from this confirmation any right or title to any gold, silver or quicksilver mines or minerals of the same, the same remaining the property of the United States."

The government now raises several objections to these findings, and it is stated: (1) that there was no evidence that any grant by an officer authorized to make it had ever been made to the original grantees from whom the petitioners derived title; (2) that there is no evidence that the grant, even if one were made, was ever recorded as required by the treaty with Mexico, dated December 30, 1853, concluding the Gadsden purchase, (10 Stat. 1031, 1035,) the sixth article of which provides that no grant made prior to September 25, 1853, will be respected or considered as obligatory which has not been located and duly recorded in the archives of Mexico; (3) that there was no sufficient evidence of possession upon which to base a presumption that a grant had ever been made.

1. For the purpose of proving that a grant had once been made of the land in question, the petitioners introduced in evidence a correct copy of the original documents showing the proceedings taken before the second civil judge of the canton, the original of which was on file in the office of the

judge at Paso del Norte. From these proceedings it appears that on January 7, 1853, José Maria Garcia, residing in the then town of El Paso del Norte, presented to the second civil judge, &c., a petition, in which he alleged that he was the testamentary executor under the will of his deceased mother, the widow of Garcia, and that among the property of that estate was a ranch called Santa Teresa, the document of which he had lost when the American forces took possession of the town, and he prayed that in order to supply in some manner the lack of the original document there be taken the testimony of certain reputable persons existing in the town, who knew that these documents were the title to the land in question, which prior to the year 1790 had been possessed by his father and thereafter occupied by his family until the Indians caused them to leave the premises. Pursuant to the petition the judge cited the witnesses named therein to appear before him, which they did, and some of them testified to the existence of certain documents relating to the ranch Santa Teresa; that they had seen those documents relating to that ranch and had seen them on file in the archives, and that they were authenticated by one of the lieutenant governors that came into the district about the close of the last century, and that by reason of the father of one of the witnesses being an employee of the town after 1821, such witness saw the original documents as to said ranch on file in the archives of his father's office, and which documents were lost when the Americans took possession of the archives of the town; that the town had been occupied by the American forces, and it was a notorious fact that those forces took a part of the public archives, and also occupied José Maria Garcia's house, taking therefrom documents relating to his property and papers of importance, among them the document of such ranch. Possession of the ranch from the time of the alleged grant was also proved. Upon evidence of this nature, testified to by several witnesses, the judge made a finding in favor of Garcia as follows:

"In view of the foregoing judicial inquiry with which the executor, José Maria Garcia, has proved legally the possession that for many years they have had of the ranch called Santa Teresa, above the dam of the the town and the Muleros bend, and it appearing that they have ever had titles to said property, and these have been lost, and from what appears from the testament and judicial inquiry there is given to the executor José Maria Garcia, for himself and in the name of the co-heirs, *without prejudice to any third party proving a better right*, the real, actual, personal, corporal possession, or that which better corresponds in law, by reason of immemorial possession, of the Santa Teresa ranch, with the enjoyment and benefits of the lands, woods and pastures, and all other products to be found on said premises, and it is ordered that he be protected and defended therein, warning all not to interrupt or molest him in said possession and free use that he may deem fit to make thereof, without he being first heard and judgment rendered against him in court after a trial."

The judge also ordered that Garcia should at a certain day named attend with the judge and witnesses, in order that he might be placed in possession, and it is afterwards recited that Garcia went to the place named with the witnesses and was placed in possession of the land described in the petition. This record of all the proceedings thus taken formed part of the archives of the office of the judge, and was an official public document belonging to such archives, as testified to by the successor of the judge. It was not the record of the original grant, such as is referred to in the treaty of 1853, but only a record of the proceedings just mentioned, and was contained in a book or collection of papers, endorsed 1853. The record was received in evidence under the objection of the government, one of the objections being that the whole proceeding was *ex parte*, and therefore incompetent as evidence for any of the parties. The court below regarded the proceeding as in the nature of one to perpetuate evidence, and held that the testimony had been taken under the provisions of the law of the Republic of Mexico of May 23, 1837, and in the judgment of the court the record was therefore admissible in evidence. The law is said to be a re-enactment of article 14 of the decree of July 22, 1833. (Reynolds, p. 173.) As translated the law reads: "Art. 14. The district judges, with respect to the towns where they live, shall have cognizance, by way of precaution, with the alcaldes of the same, in the making of inventories, evidence *ad perpetuam*, and other judicial proceedings of like nature, in which there is yet no opposition of parties."

We are not prepared to say that the record thus put in evidence was void or irregular under the law just quoted. The judgment by its terms does not assume to be conclusive. It was a judicial inquiry made according to law, before a judicial officer of the State, and while the judgment gives to the petitioner, on account of the grant proved, the lands described in his petition, yet such judgment is by its terms "without prejudice to any third party proving a better right," and it gives subject to such proof "the real, actual, personal corporal possession, or that which better corresponds in law, by reason of immemorial possession, of the Santa Teresa ranch, with the enjoyments and benefits of the lands, woods and pastures, and all other products to be found on such premises," &c. In other words, the judgment recognizes his possession and reaffirms the title of Garcia.

In the absence of any sufficient attack upon the record or of any evidence on the part of the government going to disprove or discredit the averments contained therein, we think it formed enough of a basis for the finding of the court below that there was a grant made as stated in its findings, and that such grant and the record thereof in the archives had been destroyed under the circumstances mentioned. While this evidence, as to the existence of a grant, possibly might not be sufficient of itself upon which to found a decree confirming a title under it, yet taken in connection with the

proof, which will be hereafter referred to, of possession under a grant, since 1790 up to the time of the filing of the petition in the court below, it was sufficient upon which to base a presumption of the existence of all papers necessary to constitute a title to the land possessed under it.

2. The objection of a lack of evidence that the alleged grant had ever been recorded may be considered with the one averring there was no sufficient evidence of possession upon which to base a presumption of a grant. It is claimed by the appellee that under the facts a presumption of a record, as well as of the grant, may be made. In regard to the matter of possession, it was stated in the opinion of the court below as follows:

"Our view of the evidence is that this tract of land was in the possession of Francisco Garcia exclusively during his lifetime from the beginning of this century, and that upon his death it passed to the hands of his children and remained in their possession until long after the transfer of sovereignty of the country to the United States, and is now in the possession of their grantees and their families. There have been very few claims based upon long possession more satisfactorily made out, in our minds, than is made out by the evidence in this case. These being the facts as we find them, we feel absolutely bound by the doctrine established in the case of *The United States* v. *Chaves*, (175 U. S. 509.)"

There are no adverse claimants to the land in question, and the proof of possession, exclusive in its nature, has been satisfactory to the court below. What constitutes such possession of a large tract of land depends to some extent upon circumstances, the fact varying with different conditions, such as the general state of the surrounding country, whether similar land is customarily devoted to pasturage or to the raising of crops; to the growth of timber or to mining, or other purposes. That which might show substantial possession, exclusive in its character, where the land was devoted to the grazing of numerous cattle, might be insufficient to show the same kind of possession where the land was situated in the midst of a large population and the country devoted, for instance, to manufacturing purposes. Personal familiarity with the general character of the country and of its lands, and also knowledge of the nature and manner of the use to which most of the lands in the same vicinity are put, have given the judges of the court below unusual readiness for correctly judging and appreciating the weight and value to be accorded evidence upon the subject of possession of such lands as are here involved.

Those judges will also be presumed to have been familiar with the cases involving possession decided here, such as *Whitney* v. *United States*, (167 U. S. 529, 546,) and *Bergere* v. *United States*, (168 Id. 66, 77.) When, therefore, a majority of the court decides that the evidence of possession given in the case is most satisfactory, we are inclined to concur in that view unless it is clear that the court fell into a plain error, which we think is not the case. A majority of the court has held that "There have been very few claims based upon long possession more satisfactorily made

out, in our minds, than is made out by the evidence in this case." That the dissenting justices came to a different conclusion merely shows that the evidence was such that different inferences might be drawn *therefrom*, and under such circumstances we are indisposed to review and reverse the decision of the court upon such a question of fact.

In this case we therefore take the fact to be that there was a possession under a grant of some kind, starting before 1790 and continuing, uninterrupted, until the filing of the petition. There was also evidence of the existence of a grant covering the land so possessed, together with evidence of the destruction of the documents constituting the grant, and also evidence of the destruction of the archives where the record of the grant had been, and the question arises whether such possession under these circumstances is not sufficient to presume not alone the existence of a proper and valid grant, but its proper record in the archives of Mexico, within the provisions of the treaty of 1853 with that country? We think it is, and that the evidence is sufficient not only to presume a grant but to presume any other matter which would have occurred in order to render the grant a perfectly valid one and the evidence of it sufficient within the requirements of the treaty. The treaty of 1853 did not require a record, in all cases, to be made at the seat of government of Mexico as a condition of the recognition of the grant by the government of the United States. If the record had been made in the place where records of that nature were customarily made for lands granted in the vicinity, it was, as we think, within the provisions of the treaty. It appears sufficiently, in our opinion, that Paso del Norte was the place where the archives of Mexico were kept in regard to grants of land in that neighborhood, and there is some evidence of the destruction of those archives, or of part of them, including the record of the grant in question here, by the American troops.

The appellants further claim that a lieutenant governor had no authority to grant public lands unless he were a subdelegate or had been authorized by the governor to make the grant, and that there is here no evidence of either fact. But possession under a grant, so long continued and so complete as is the case here, may well authorize, if necessary, the presumption that the lieutenant governor was either a subdelegate or that he had been authorized or his act ratified by the governor and the grant duly recorded. It is not the case of basing a presumption of authority to make a grant upon the mere fact that the officer made it, and must therefore be presumed to have had authority. Lieutenant governors in the province of Louisiana were, by virtue of their office, subdelegates, and as such had power to grant what is termed incomplete titles, and such grants might be confirmed. (*Chouteau's Heirs* v. *The United States*, 9 Pet. 137, 144.) There is no evidence that lieutenant governors in Mexico did not have the same powers, and a presumption of confirmation might be made in cases of long continued, exclusive and uninterrupted possession under such a grant. It is the long con-

tinued, uninterrupted and exclusive character of the possession here proved which is so important, and when supported, as it has been by the evidence of a grant, and of possession in accordance with and under it, the presumption of validity may safely be made.

A record may in a case like this be presumed to have been made, just as well as the existence of a grant may be presumed. Where the exclusive character of the possession is so long, so uninterrupted and so satisfactorily made out as in this case, and where other proof exists of the actual making of a grant of some kind of the land in controversy, the papers constituting such grant having been seen among the archives of Mexico, although the papers themselves have been destroyed, we think a case is made out showing not only that a grant had been made, but that it was duly located and recorded. The record was to be in the archives of Mexico, under the provisions of the treaty, and those archives, according to the evidence, may be presumed in fact to have existed at the place where the documents and their record were in truth destroyed. Taking all the evidence, there is room for the presumption of a record of the grant as well as that for the existence of the grant itself.

In *United States* v. *Chaves*, (159 U. S. 452,) Mr. Justice Shiras, after speaking of the fact that there was ample evidence to show that the claimants had been put in juridical possession of the land covered by the grant from the government of New Mexico, which had authority to make it, continued, (page 463):

"However, we do not wish to be understood as undervaluing the fact of a possession so long and uninterrupted as disclosed in this case. Without going at length into the subject, it may be safely said that by the weight of authority, as well as the preponderance of opinion, it is the general rule of American law that a grant will be presumed upon proof of an adverse, exclusive and uninterrupted possession for twenty years, and that such rule will be applied as a *presumptio juris et de jure*, wherever, by possibility, a right may be acquired in any manner known to the law. (1 Greenleaf Ev. 12th ed. sec. 17; *Ricard* v. *Williams*, 7 Wheat. 59, 109; *Coolidge* v. *Learned*, 8 Pick. 503.) Nothing, it is true, can be claimed by prescription which owes its origin to and can only be had by matter of record; but lapse of time accompanied by acts done, or other circumstances, may warrant the jury in presuming a grant or title by record. Thus, also, though lapse of time does not, of itself furnish a conclusive bar to the title of the sovereign, agreeably to the maxim, *nullum tempus occurrit regi*; yet, if the adverse claim could have a legal commencement, juries are advised or instructed to presume such commencement, after many years of uninterrupted possession or enjoyment. Accordingly, royal grants have been thus found by the jury, after an indefinitely long-continued peaceful enjoyment, accompanied by the usual acts of ownership. (1 Greenl. Ev. sec. 45.) The principle upon which this doctrine rests is one of general jurisprudence, and is recognized in the Roman law and the codes founded thereon, (Best's Principles of Evidence, sec. 366,) and was therefore a feature of the Mexican law at the time of the cession."

In the still later case of *United States* v. *Chaves*, (175 U. S. 509,) long continued and uninterrupted possession of lands in Mexico, beginning long prior to the transfer of the territory to this country and continuing after that transfer, was held sufficient upon which to base presumptions enough for a legal judgment in favor of such possession in the absence of rebutting circumstances. It is true there was an original grant to one of the occupants, Antonio Gutierrez, but the claimant was unable to present any direct conveyance from the original grantee or from his heirs with which he was in any way connected. He relied in fact upon evidence of possession by himself and his predecessors in title. Mr. Justice McKenna, in delivering the opinion of the court, made an extended examination of the law in regard to presumptions from possession, and it was held that proof of possession may be sufficient to admit of a presumption that everything had been done that was necessary to be done by way of a grant or conveyance of the title to the individual in possession or his predecessors.

But the court below has not acted in this case upon evidence of mere possession, unaccompanied by any written evidence conferring, or professing to confer, a title of some description.

In *United States* v. *Power's Heirs*, (11 How. 570, 580,) the grant actually proved was held to have no force, and it was alleged that those under whom plaintiff claimed possession held by some verbal permission from the government for many years under France and Great Britain. But no proof, even of that fact, was made, and as said in the opinion of the court, "if there had been such proof, it would be of no value, as the District Court did not possess power to act on evidence of naked possession unaccompanied by written evidence conferring, or professing to confer, a title of some description."

To the same effect is *United States* v. *Heirs of Rillieux*, (14 How. 189,) where it was said that under the acts of Congress no decree could be founded upon mere possession.

In this case proof was given of a grant of some nature to petitioner's predecessor, which covered the land in question, accompanied by proof that such grant had been actually destroyed by the American troops, so that it could not be produced. Proof of the grant tended to characterize the possession which was also proved, and to render it of an adverse and exclusive nature. The lower court found as a fact the exclusive possession of such land by Garcia during his lifetime, from the beginning of the century, and then by his children, until long after the transfer of the sovereignty of the country to the United States, and that such possession continued in the hands of their grantees and their families. Evidence of the actual existence of the grant, together with evidence of this kind of exclusive possession under a claim of title, is more than mere proof of naked possession given solely for the purpose of therefrom inferring, in the absence of

all other evidence of its existence, that a grant had once been made. It does not come within the principle of the above cited cases nor violate the act of 1891, establishing the court. We do not understand that the treaty or that act made it absolutely necessary that a grant should actually be produced upon the trial, and that if one had been executed and by some accident destroyed, no proof could be given of its contents, or any proof of possession of the lands in accordance with the grant be received. Nor do we understand that it was requisite that a record of the grant should be produced, in all cases, or that in its absence the petitioner must inevitably fail.

The contents of written instruments may be proved by parol, when it is shown that the instrument itself has been lost or destroyed under such circumstances as to show the loss or destruction was not the voluntary and intentional act of the party claiming a benefit under its provisions. And in such case as this we do not think the treaty or the act of Congress was intended to debar parol proof of the existence and of the contents of a grant which had been destroyed under the circumstances detailed, or that under such circumstances a presumption that the grant had been recorded could not be indulged. (*United States* v. *Sutter*, 21 How. 170–174; *United States* v. *Castro*, 24 How. 346, 350; *Peralta* v. *United States*, 3 Wall. 434.)

Within the cases heretofore cited, we are of opinion that the evidence of possession was sufficient, in connection with the other evidence referred to, upon which to base a presumption that the petitioner had a title to the land which should be confirmed, within the treaty of 1853 and the provisions of the act of 1891, establishing the Court of Private Land Claims, and the judgment should, therefore, be

Affirmed.

Mr. Justice GRAY and Mr. Justice WHITE took no part in the decision of this case.

True copy.

Test:

Clerk Supreme Court, U. S.